



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

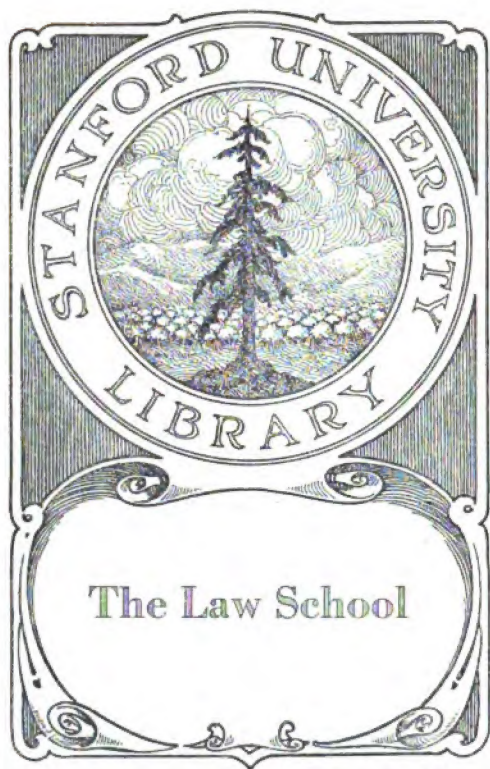
### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

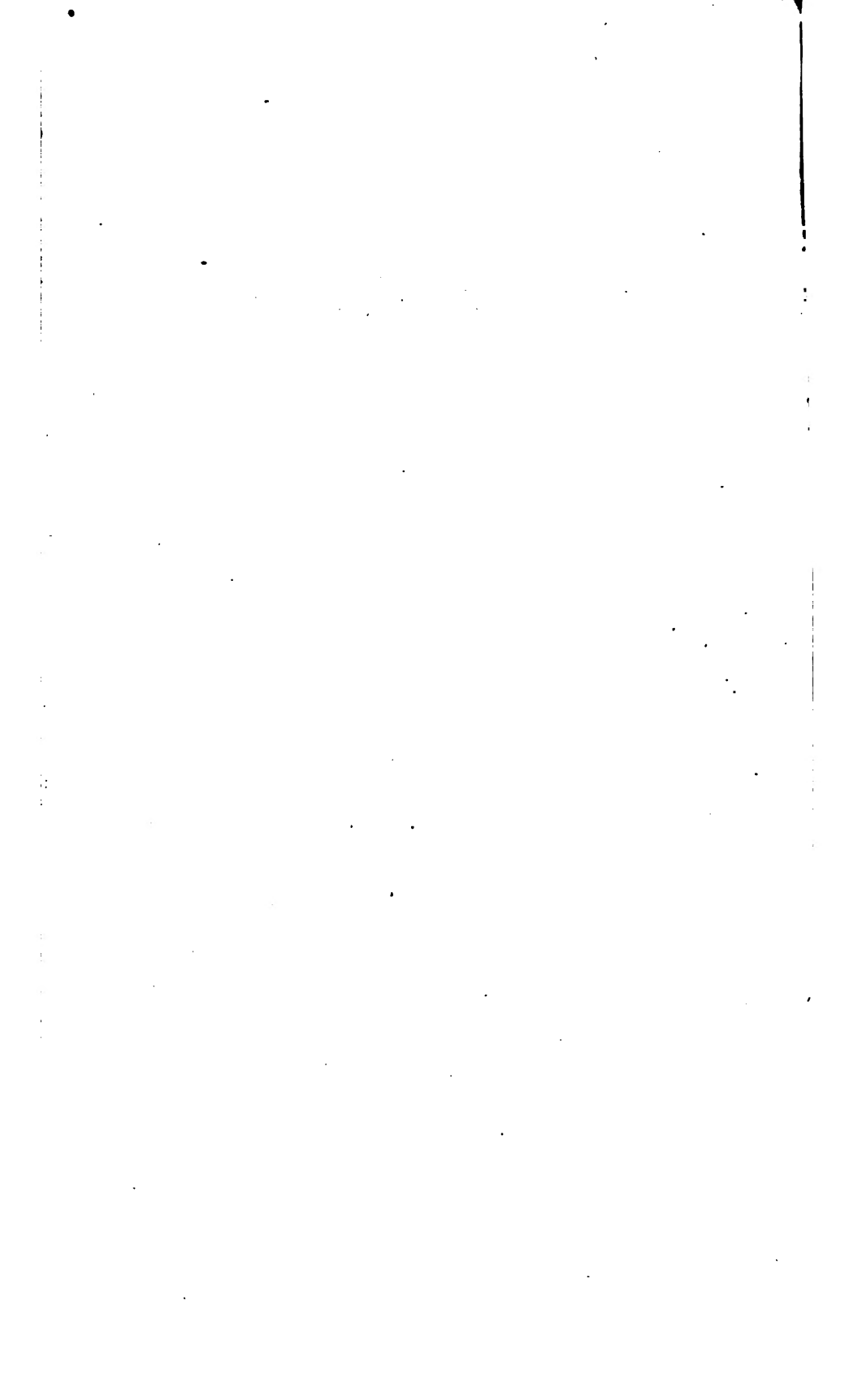




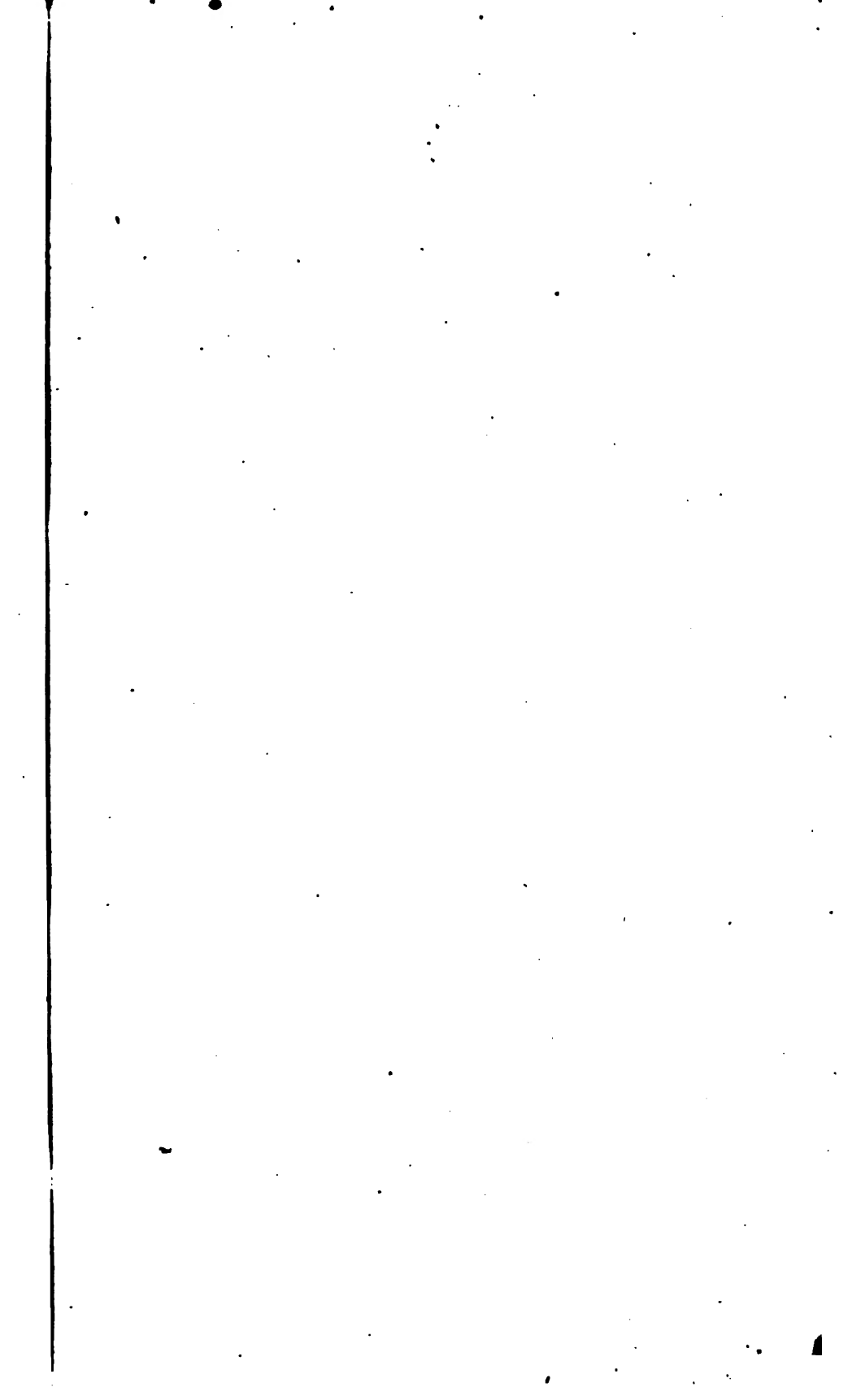


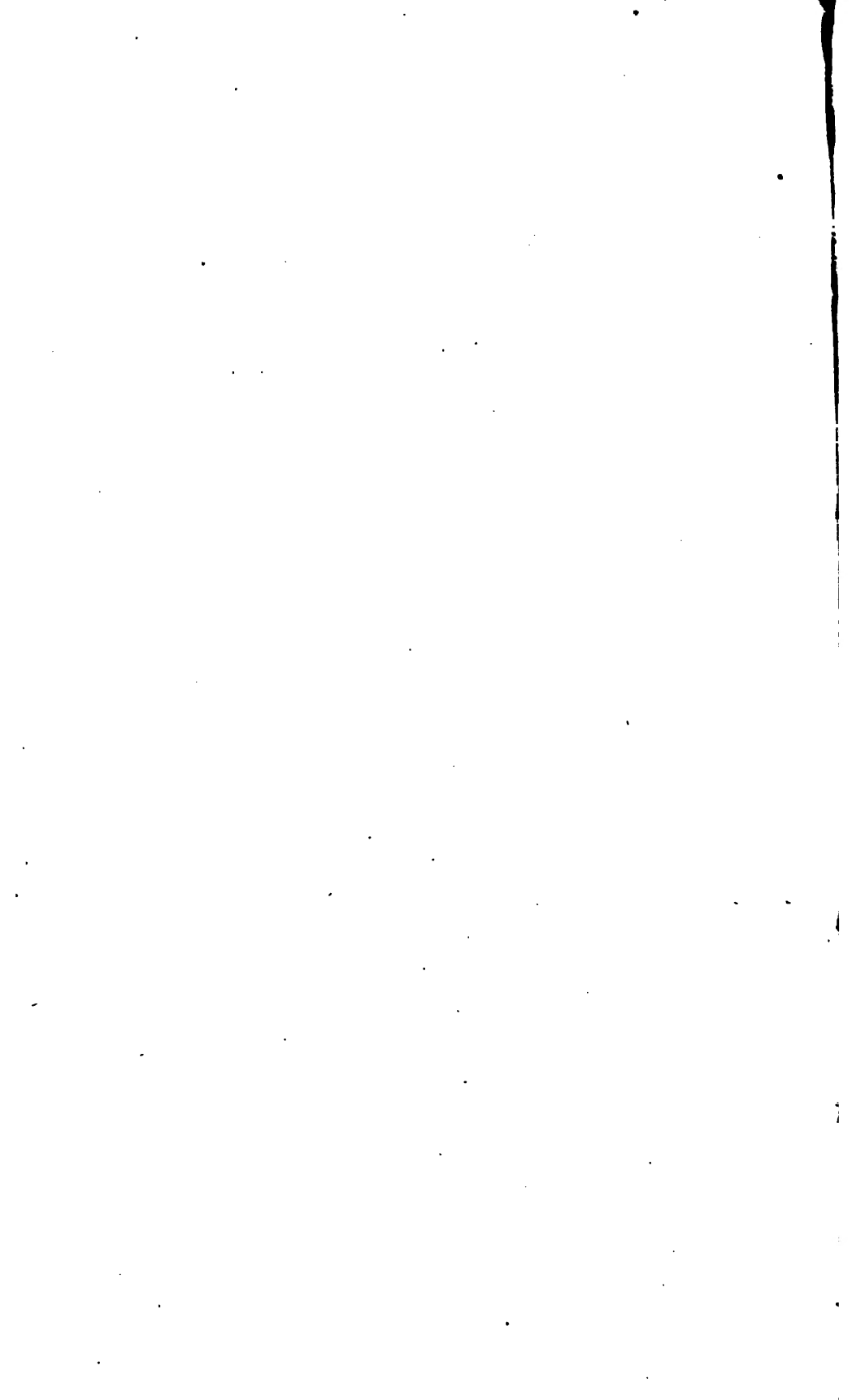


















REPORTS  
OF  
CASES DECIDED  
BY THE  
ENGLISH COURTS,  
WITH  
NOTES AND REFERENCES TO KINDRED CASES  
AND AUTHORITIES.

BY  
NATHANIEL C. MOAK,  
Counselor at Law.

VOLUME XXX.

CONTAINING

3 COMMON PLEAS DIVISION, pp. 1-509.  
4 COMMON PLEAS DIVISION, pp. 1-457.  
5 COMMON PLEAS DIVISION, pp. 1-361.

ALBANY, N. Y.:  
WILLIAM GOULD & SON,  
LAW PUBLISHERS AND BOOKSELLERS.  
1882.

---

Entered according to Act of Congress in the year eighteen hundred and eighty-two,  
By WILLIAM GOULD & SON,  
in the office of the Librarian of Congress, at Washington.

---

359785.

WILLIAM GOULD & SON

# JUDGES.

---

## LORD HIGH CHANCELLOR.

Right Hon. LORD CAIRNS,<sup>1</sup> appointed 1874.

Right Hon. LORD SELBORNE,<sup>2</sup> " 1880.

## LORDS OF APPEAL IN ORDINARY.

Right Hon. LORD BLACKBURN, appointed 1876.

Right Hon. LORD GORDON,<sup>3</sup> " "

Right Hon. WILLIAM WATSON,<sup>4</sup> " 1880.

## PRIVY COUNCIL, JUDICIAL COMMITTEE.

(APPOINTED UNDER 34 & 35 VICT., CH. 91: USUALLY SITTING.)

Right Hon. Sir JAMES W. COLVILLE.<sup>5</sup>

Right Hon. Sir BARNES PEACOCK.

Right Hon. Sir MONTAGUE E. SMITH.<sup>6</sup>

Right Hon. Sir ROBERT P. COLLIER.

Right Hon. Sir RICHARD COUCH.<sup>7</sup>

---

<sup>1</sup> Retired with Earl of Beaconsfield's administration, April, 1880: 15 L. J., 227.

<sup>2</sup> Appointed under Gladstone's administration, April, 1880: 15 L. J., 227.

<sup>3</sup> Died August 21, 1879: 15 L. J., 115.

<sup>4</sup> Appointed to fill vacancy of Lord GORDON, April, 1880: 15 L. J., 115, 234.

<sup>5</sup> Died December 7, 1880: 15 L. J., 595, 602.

<sup>6</sup> Resigned December 21, 1881: 16 L. J., 607, 622; 72 L. T., 163.

<sup>7</sup> Appointed January 23, 1881, in place of Sir JAMES W. COLVILLE 16 L. J. 49, 58.

## SUPREME COURT OF JUDICATURE.

## COURT OF APPEAL.

*Ex officio Members.*

The Right Hon. the LORD HIGH CHANCELLOR (President).  
 The Right Hon. the LORD CHIEF JUSTICE of England.  
 The Right Hon. the MASTER of the ROLLS.  
 The Right Hon. the LORD CHIEF JUSTICE of the Common Pleas.  
 The Right Hon. the LORD CHIEF BARON of the Exchequer.

*Ordinary Members.*

Right Hon. Sir WILLIAM MILBOURNE JAMES, <sup>1</sup>	appointed 1870.
Right Hon. Sir GEORGE MELLISH, <sup>2</sup>	" "
Right Hon. Sir RICHARD BAGGALLAY,	" 1875.
Right Hon. Sir GEORGE WM. W. BRAMWELL, <sup>3</sup>	" 1876.
Right Hon. Sir WILLIAM BALIOL BRETT,	" "
Right Hon. Sir RICHARD PAUL AMPHLETT, <sup>4</sup>	" "
Right Hon. Sir HENRY COTTON, <sup>5</sup>	" 1877.
Right Hon. Sir ALFRED HENRY THESIGER, <sup>6</sup>	" "
Right Hon. Sir GEORGE JESSEL, <sup>7</sup>	" 1881.
Right Hon. Sir NATHANIEL LINDLEY, <sup>8</sup>	" "
Right Hon. Sir JOHN HOLKER, <sup>9</sup>	" 1882.
Right Hon. Sir CHARLES SYNGE CHRISTOPHER BOWEN, <sup>10</sup>	" "
Right Hon. Sir JOHN DAVID FITZGERALD, <sup>11</sup>	" "

<sup>1</sup> Died June 7, 1881: 16 Law Jour., 258; 71 Law Times, 106.

<sup>2</sup> Died June 16, 1877: 12 Law Jour., 372.

<sup>3</sup> Retired September 1, 1881: 71 L. T., 333; 16 L. J., 411.

<sup>4</sup> Retired on account of ill health, October, 1877: 63 L. T., 417.

<sup>5</sup> Appointed June, 1877, in place of Lord Justice MELLISH: 12 Law Jour., 386.

<sup>6</sup> Appointed November, 1877, in place of Lord Justice AMPHLETT: 12 L. J., 631. Died October 20, 1880: 15 L. J., 507, 508, 518, 527; 69 L. T., 419, 433.

<sup>7</sup> Promoted to Court of Appeal, September 10, 1881: 16 L. J., 397.

<sup>8</sup> Promoted from Court of Common Pleas, October 29, 1881: 71 L. T., 409. Sworn in November 1, 1881: 72 L. T., 12.

<sup>9</sup> Died May 24, 1882: 17 L. J., 275; 73 L. T., 71.

<sup>10</sup> Appointed from Queen's Bench to Court of Appeal, in place of Sir JOHN HOLKER June 1, 1882: 73 L. T., 87; 17 L. J., 289.

<sup>11</sup> Appointed June 6, 1882: 73 L. T., 104; 18 L. J., 318.



## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Right Hon. the LORD HIGH CHANCELLOR (President).

Right Hon. Sir GEORGE JESSEL, <sup>1</sup>	Master of the Rolls, appointed 1873.	
Hon. Sir RICHARD MALINS, <sup>2</sup>	Vice-Chancellor,	" 1866.
Hon. Sir JAMES BACON,	" "	" 1870.
Hon. Sir CHARLES HALL,	" "	" 1873.
Hon. Sir EDWARD E. KAY, <sup>3</sup>	" "	" 1881.
Hon. Sir EDWARD FRY, <sup>4</sup>	Justice of the High Court,	" 1877.
Hon. Sir JOSEPH W. CHITTY, <sup>5</sup>	Justice of the High Court,	" 1881.

### QUEEN'S BENCH DIVISION.

Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN,<sup>6</sup> Bart., G.C.B.,  
Lord Chief Justice of England, appointed 1859.

Right Hon. Sir JOHN DUKE COLERIDGE,<sup>7</sup> Lord Chief Justice of England,  
appointed Dec. 1, 1880.

Hon. Sir JOHN MELLOR, <sup>8</sup>	appointed 1861.
Hon. Sir ROBERT LUSH, <sup>9</sup>	" 1865.
Hon. Sir WILLIAM FIELD,	" 1875.
Hon. Sir HENRY MANISTY,	" 1876.
Hon. Sir CHARLES SYNGE CHRISTOPHER BOWEN, <sup>10</sup>	" 1879.
Hon. Sir FORD NORTH, <sup>11</sup>	" 1881.
Hon. Sir JOHN HOLKER, <sup>12</sup>	" 1882.
Hon. Sir CHARLES DAY, <sup>13</sup>	" "

1 Promoted to Court of Appeal, September 10, 1881: 16 L. J., 397.

2 Retired March 19, 1881: 16 L. J., 137, 146.

3 Appointed March 30, 1881: 16 L. J., 147.

4 Appointed April 30, 1877, under the act of April 24, 1877: 12 Law Jour., 251.

5 Appointed September 6, 1881: 71 L. T., 321, 328; 16 L. J., 397.

6 Died November 20, 1880: 16 L. J., 576, 589; 15 Am. L. Rev., 134.

7 Appointed to fill vacancy occasioned by death of Lord Cockburn.

8 Resigned June 11, 1879: 14 Law Jour., 365; 67 Law Times, 127.

9 Died December 27, 1881: 72 L. T., 145, 173; 16 L. J., 624; 17 L. J., 6.

10 Appointed June 11, 1879: 14 Law Jour., 365; 67 Law Times, 127—transferred to Court of Appeal, June 1, 1882.

11 Appointed in place of Mr. Justice LINDLEY, promoted to Court of Appeal. Sworn in November 1, 1881: 72 L. T., 1, 12.

12 Appointed January 10, 1882: 17 L. J., 15, 33; 72 L. T., 181. Died May 24, 1882: 17 L. J., 275; 73 L. T., 71; 73 L. T., 87; 17 L. J., 289.

13 Appointed June 5, 1882: 18 L. J., 319; 73 L. T., 91.

## NAMES OF THE JUDGES.

## COMMON PLEAS DIVISION.

Right Hon. LORD COLERIDGE,<sup>1</sup> Lord Chief Justice of the Common Pleas,  
appointed 1873.

Hon. Sir WILLIAM ROBERT GROVE, appointed 1871.

Hon. GEORGE DENMAN, " 1873.

Hon. Sir NATHANIEL LINDLEY,<sup>2</sup> " 1875.

Hon. Sir HENRY CHARLES LOPES, " 1876.

Hon. Sir J. C. MATHEW,<sup>3</sup> " 1881.

Hon. Sir HENRY MATHER JACKSON,<sup>4</sup> " "

Hon. Sir LEWIS CAVE,<sup>5</sup> " "

## EXCHEQUER DIVISION.

Right Hon. Sir FITZ-ROY KELLY,<sup>6</sup> Lord Chief Baron, appointed 1866.

Hon. Sir ANTHONY CLEASBY,<sup>7</sup> appointed 1868.

Hon. Sir CHARLES EDWARD POLLOCK, " 1873.

Hon. Sir JOHN WALTER HUDDLESTON, " 1875.

Hon. Sir HENRY HAWKINS, " 1876.

Hon. Sir JAMES FITZ-JAMES STEPHEN,<sup>8</sup> " 1879.

## COURT OF APPEAL IN BANKRUPTCY.

The Ordinary Judges of the Court of Appeal.

## PROBATE, MATRIMONIAL, DIVORCE AND ADMIRALTY DIVISION.

Right Hon. Sir JAMES HANNEN (President), appointed 1872.

Right Hon. Sir ROBERT J. PHILLIMORE, " 1876.

## CHIEF JUDGE IN BANKRUPTCY.

Hon. Sir JAMES BACON, Vice-Chancellor.

## JUDGE OF THE COURT OF ARCHES.

LORD PENZANCE, appointed 1875.

1 Appointed to fill vacancy occasioned by death of Lord Cockburn.

2 Promoted to Court of Appeal, October 29, 1881: 71 L. T., 409.

3 Appointed March 1, 1881: 16 Law Jour., 103.

4 Appointed March 1, 1881: 16 L. J., 103. Died March 12, 1881: 16 L. J., 113.

5 Appointed March 26, 1881, to fill vacancy occasioned by death of Mr. Justice JACKSON:  
16 Law Journal, 123.

6 Died September 18, 1880: 16 Law Jour., 459; 69 Law Times, 359, 367.

7 Resigned January, 1879: 14 Law Jour., 15; 66 Law Times, 191.

8 Appointed January, 1879, in place of Baron CLEASBY: 14 L. Jour., 34; 66 Law Times, 191.

# TABLE OF CASES

## REPORTED IN THIS VOLUME.

A.	PAGE.	PAGE.	
Albion Life, etc., ads. Blake,.....	417	Brunswick Benefit, etc., ads. Chapleo,.....	820
Allan ads. Kipling,.....	220	Bryant vs. Lefever,.....	474
Anderson ads. Wagstaff,.....	550	Burke vs. South Eastern Railway Co.,.....	671
Andrade ads. Lazarus,.....	803	Burliner vs. Royle,.....	840
Attenborough vs. St. Katharine's Dock Co.,.....	236, 295	Bury, Lord, ads. Bennett,.....	828
Aveland vs. Lucas,.....	840	Button vs. O'Neill,.....	595
Aynard ads. Belmonte,.....	503, 598	Byrne vs. Van Tienhoven,.....	838
B.		C.	
Banque Franco, etc., ads. Grant,...	105	Calvert ads. Wilkinson,.....	229
Barnes ads. Elphick,.....	810	Campbell vs. Strangeways,.....	54
Barrett ads. Carey,.....	607	Carey vs. Barrett,.....	607
Bath vs. White,.....	91	Carrington ads. Macdonald,.....	382
Beatson ads. Leeds and County Banking Co.,.....	493, 709	Castle vs. Downton,.....	702
Beatson ads. Yorkshire Banking Co.,.....	493	Caughey vs. Gordon,.....	267
Belmonte vs. Aynard,.....	503, 598	Chapleo vs. Brunswick, etc.,.....	820
Bennett vs. Lord Bury,.....	828	Chapman vs. Knight,.....	794
Bent vs. Wakefield Bank,.....	360	Charles vs. Taylor,.....	331
Berghelm vs. Great Eastern Railway,.....	117	Chesworth vs. Hunt,.....	763
Berringer vs. Great Eastern Railway Co.,.....	466	City and County Bank ads. Collins,.	162
Betteley ads. Hamlyn,.....	820	City and County Bank ads. Stone,.	157
Blake vs. Albion Life Assurance Society,.....	417	Clarke ads. Usill,.....	188
Blakey ads. Hindhaugh,.....	72	Cockerell, Matter of,.....	391
Boning ads. Finch,.....	447	Collins vs. City and County Bank,.	162
Booker ads. Wiseman,.....	95	Colvill ads. Migotti,.....	507
Bowling Iron Co. ads. Firth,.....	146	Corbet vs. Haigh,.....	701
Bradburn vs. Foley,.....	65	Corbidge ads. Sheffield, etc.,.....	634
Brearley ads. Usill,.....	188	Corsten ads. Godden,.....	690
Bridle, Matter of,.....	579	Coxhead vs. Mullis,.....	285
Briggs ads. Rawlins,.....	231	Cragg ads. Mortimore,.....	112
Brocklebank vs. Lynn Steamship Co.,.....	229	Credit Lyonnais Co. ads. Johnson,.	19
Brookes vs. Drysdale,.....	38	Culliford ads. Hayn,.....	259, 482
		Cunningham vs. Dunn,.....	289
		D.	
		Davies ads. Morgan,.....	151
		Davis vs. Flagstaff Mining Co.,....	126

	PAGE.		PAGE.
Davis vs. Goodman,.....	727	Hamilton ads. Kendall,.....	250
De Greuchy vs. Wills,.....	595	Hamilton ads. Ottawa,.....	241
Dickson vs. Reuter's Telegram Co.,	1	Hamlyn vs. Betteley,.....	320
Dixon vs. Sea Insurance Company,	600	Hancocks vs. Lablache,.....	100
Dixon vs. Whitworth,.....	600	Harris vs. Warre,.....	435
Dolphin vs. Layton,.....	440	Hartley vs. Hudson,.....	596
Doughty ads. Northcote,.....	612	Hawkins ads. Whiteman,.....	375
Downton ads. Castle,.....	702	Hayn vs. Culliford,.....	259, 482
Drew ads. Ford,.....	702	Hayton vs. Irwin,.....	728
Drews ads. Porter,.....	733	Hazeldine ads. Stannanought,.....	486
Drysdale ads. Brookes,.....	38	Heuson ads. Phillips,.....	19
Dunn ads. Cunningham,.....	289	Hill vs. Wilson,.....	573
		Hindhaugh v. Blakey,.....	72
<b>E.</b>		Houghton ads. West,.....	487
Easterbrook ads. Saxley,.....	209	Hudson ads. Hartley,.....	596
Elmore vs. Hunter,.....	58	Hunt ads. Chesworth,.....	763
Elphick vs. Barnes,.....	810	Hunt vs. Wimbledon Local Board,	106, 400
Emma Silver Mining Co. vs. Lewis,	619	Hunter ads. Elmore,.....	58
		Hurdman vs. North Eastern Rail-	way,..... 81
<b>F.</b>			
Fielding vs. Rhyl Improvement		<b>I.</b>	
Commissioners,.....	155	Imperial Marine, etc., vs. Fire In-	
Finch vs. Boning,.....	447	insurance Corporation,.....	468
Fire Insurance Corporation ads.		Irwin ads. Hayton,.....	728
Imperial Marine Insurance Co.,	468		
Firth vs. Bowling Iron Company,.	146	<b>J.</b>	
Flagstaff Mining Co. ads. Davis,.	125	Jersey, Earl of, ads. Shaw,.....	595
Foley ads. Bradburn,.....	65	Johnson vs. Credit Lyonnais Co.,.	19
Ford vs. Drew,.....	702	Johnson vs. Lancashire, etc.,.	350
Foster vs. Wright,.....	648	Jones vs. Robinson,.....	215
Foulkes vs. Metropolitan District			
Railway Co.,.....	536, 740	<b>K.</b>	
Franklin ads. Guardians of St.		Kaltenbach vs. Mackenzie,.....	310
Leonards, Shoreditch,.....	237	Kendall vs. Hamilton,.....	250
French vs. Newgass,.....	77	Kipling vs. Allan,.....	220
Froelich ads. Meyerhoff,.....	200, 413	Kipling vs. Todd,.....	230
		Knight ads. Chapman,.....	794
<b>G.</b>			
Godden vs. Corsten,.....	690	<b>L.</b>	
Goodman ads. Davis,.....	727	Lablache ads. Hancock,.....	100
Gordon ads. Caughey,.....	267	Lake ads. Tozer,.....	562
Grant vs. Banque, etc.,.....	105	Lancashire and Yorkshire Railway	
Grant vs. Overseers of Pagham,...	58	Co. ads. Johnson,.....	350
Grant ads. Twycross,.....	393	Layton ads. Dolphin,.....	440
Great Eastern, etc., ads. Berg-		Lazarus vs. Andrade,.....	803
heim,.....	117	Leeds and County Banking Co. vs.	
Great Eastern, etc., ads. Berringer,	466	Beatson,.....	493
Guardians of Nottingham vs. Tom-		Lefever ads. Bryant,.....	474
kinson,.....	585	Lenanton ads. Union Bank of Lon-	don,..... 139
<b>H.</b>			
Haigh ads. Corbet,.....	701		
Hales ads. Usill,.....	183		



# TABLE OF CASES.

ix

	PAGE.
Lester ads. Steel,.....	58
Le Tailleur vs. South Eastern Rail- way Co.,.....	18
Lewis ads. Emma Silver Mining Co.,.....	619
London and Brighton Railway Co. vs. Watson,.....	277, 433
London and County Bank ads. Mat- thiessen,.....	678
London and South Western Rail- way Co. ads. Phillips,.....	769
Long vs. Millar,.....	659
Lonsdale ads. Sheward,.....	701
Lord Bury ads. Bennett,.....	828
Lovell vs. Newton,.....	369
Lucas ads. Aveland,.....	640
Lynn Steamship Co. ads. Brockle- bank,.....	229

## M.

Macdonald vs. Carrington,.....	382
Mackenzie vs. Kaltenbach,.....	310
Matthiessen vs. London and County Bank,.....	678
Metropolitan District Railway Co. ads. Foulkes,.....	536, 740
Meyerhoff vs. Froelich,.....	200, 413
Migotti vs. Colvill,.....	507
Millar ads. Long,.....	659
M'Innes ads. Woods,.....	417
M'Keand ads. Taylor,.....	843
Morgan vs. Davies,.....	151
Morgan ads. Smith,.....	826
Mortimore vs. Cragg,.....	112
Mullis ads. Coxhead,.....	285

## N.

Neptune Marine Ins. Co. ads. Pel- las,.....	443, 694
Newgass ads. French,.....	77
Newton ads. Lovell,.....	369
Northcote vs. Doughty,.....	612
North Eastern Railway ads. Hurd- man,.....	81
Nottingham, Guardians of, vs. Tomkinson,.....	585

## O.

O'Neill ads. Button,.....	595
Ottaway vs. Hamilton,.....	241

## P.

Pagham, Overseers of, ads. Grant,.....	53
30 ENG. REP. ....	B

	PAGE.
Parry vs. Smith,.....	564
Pellas vs. Neptune Marine Insur- ance Co.,.....	443, 694
Phillips vs. Heuson,.....	19
Phillips vs. London and South Western Railway Co.,.....	769
Porter vs. Drew,.....	733

## R.

Rawlins vs. Briggs,.....	231
Reuter vs. Sala,.....	518
Reuter's Telegram Co. ads. Dick- son,.....	1
Rhyl Improvement, etc., ads. Field- ing,.....	155
River Plate Bank ads. Yglesias, 46,	183
Robinson ads. Jones,.....	215
Royle ads. Burliner,.....	840

## S.

Sala ads. Reuter,.....	518
Saxby vs. Easterbrook,.....	209
Scaramanga vs. Stamp,.....	557, 782
Sea Insurance Company ads. Dixon,	600
Shaw vs. Earl of Jersey,.....	595
Sheffield, etc., vs. Corbridge,.....	634
Sheffield Waterworks, etc., vs. Wilkinson,.....	634
Sheward vs. Lonsdale,.....	701
Smith vs. Morgan,.....	826
Smith ads. Parry,.....	564
Smith vs. West Derby Local Board,	271
Smith vs. Widlake,.....	10
South Eastern Railway Co. ads. Burke,.....	671
South Eastern Railway Co. ads. Le Tailleur,.....	18
Stamp ads. Scaramanga,.....	557, 782
St. Katharine's Dock Co. ads. At- tenborough,.....	286, 295
St. Leonard's, Shoreditch, vs. Franklin,.....	237
Stannanought vs. Hazeldine,.....	486
Steel vs. Lester,.....	58
Stevenson vs. Watson,.....	451
Stone vs. City and County Bank, ..	156
Strangeways ads. Campbell,.....	54

## T.

Taylor ads. Charles,.....	331
Taylor vs. M'Keand,.....	843
Todd ads. Kipling,.....	220
Tomkinson ads. Guardians of Not- tingham,.....	585

**X**

**TABLE OF CASES.**

	PAGE.
Tozer vs. Lake,.....	562
Twycross vs. Grant,.....	303

**U.**

Union Bank of London vs. Lenan- ton,.....	139
Usill vs. Brearley,.....	188
Usill vs. Clarke,.....	188
Usill vs. Hales,.....	188

**V.**

Van Tienhoven ads. Byrne,.....	833
--------------------------------	-----

**W.**

Wagstaff vs. Anderson,.....	550, 752
Wakefield Bank ads. Bent,.....	360
Warre ads. Harris,.....	433
Watson ads. London and Brighton Railway Co.,.....	277, 433

	PAGE.
Watson ads. Stevenson,.....	451
West vs. Houghton,.....	487
West Derby Local Board ads. Smith,.....	271
White ads. Bath,.....	91
Whiteman vs. Hawkins,.....	375
Whitworth ads. Dixon,.....	600
Widlake ads. Smith,.....	10
Wilkinson vs. Calvert,.....	229
Wilkinson ads. Sheffield, etc.,.....	634
Wills ads. De Greuchy,.....	595
Wilson ads. Hill,.....	593
Wimbledon Local Board ads. Hunt,.....	106, 400
Wiseman vs. Booker,.....	95
Woods vs. M'Innes,.....	417
Wright ads. Foster,.....	648

**Y.**

Yglesias vs. River Plate Bank, 46,	198
Yorkshire Banking Co. vs. Beat- son,.....	493, 709.

CASES  
DETERMINED BY THE  
COMMON PLEAS DIVISION  
OF THE  
HIGH COURT OF JUSTICE,  
AND BY THE  
COURT OF APPEAL  
ON APPEAL FROM THE COMMON PLEAS DIVISION.  
XLI VICTORIA.

[3 Common Pleas Division, 1.]

Nov. 3, 1877.

[IN THE COURT OF APPEAL.]

**\*DICKSON and Others v. REUTER'S TELEGRAM [1  
COMPANY, Limited (').]**

*Telegraph Company—Representation of Accuracy of Message—Privity of Contract—  
Negligence—Liability for Mistake in delivering Message.*

The defendants, a telegram company, through the negligence of their servants, delivered to the plaintiffs a message which was not intended for them. The plaintiffs, who reasonably supposed that the message came from their agents and was intended for them, acted upon it and thereby incurred a loss:

*Held*, affirming the decision of the Common Pleas Division, that the plaintiffs could not maintain any action against the defendants upon the ground of their negligence, or of an implied representation by them that the message was sent by the plaintiffs' agents.

APPEAL from the judgment of the Common Pleas Division in favor of the defendants on demurrer to the statement of claim, which alleged that the plaintiffs were merchants at Valparaiso, and were a branch house of the firm of Dickson, Robinson & Co., of Liverpool; the defendants were a telegraph company, having their chief offices in London,

(') Affirming 19 Eng. R., 313.

1877

Dickson v. Repter's Telegram Company.

and agencies in Liverpool and in various parts of the world, 2] including South America. The \*defendants had a system of forwarding in one "packed" telegram the messages of several senders, each message being distinguished and headed by a registered cipher known to the defendants and their agents and also to the senders, which messages, on receipt of the packed telegrams by the defendants' agents, were transmitted to the proper recipients. Previous to December, 1874, Dickson, Robinson & Co. were in the habit of sending messages to the plaintiffs through the defendants' company, and were instructed by the defendants to head the messages by a registered cipher word indicating that the messages were intended for the plaintiffs. On the 26th of December, 1874, the plaintiffs received at Valparaiso a telegraphic message, which they understood, and reasonably understood, to be a direction from Dickson, Robinson & Co. to ship barley to England; but the message was not in fact intended for the plaintiffs. The misdelivery was caused by the negligence of the defendants or their agents. On receiving the telegram the plaintiffs proceeded to execute the supposed order and shipped large quantities of barley to England. Owing to a fall in the market for barley, the plaintiffs, by reason of the shipments, sustained a serious loss, and they now claimed that the defendants' company should reimburse them for that loss.

The facts are fully stated in 2 C. P. D., 62, where the proceedings in the Common Pleas Division are reported.

Nov. 2, 3. *Herschell*, Q.C. (*Benjamin*, Q.C., and *W. H. Butler* with him), for the plaintiffs: The question is, whether the statement of claim shows any cause of action. No doubt the case is novel, but if in the progress of mercantile dealing new cases arise, the court will evolve the principle of law necessary to meet the exigencies of them, as was done in *Collen v. Wright* ('). This action can be supported on two grounds: first, the defendants warranted to the plaintiffs that they had been employed to deliver this message to the plaintiffs, and the defendants are liable for a breach of warranty, in analogy to the case of *Collen v. Wright* ('), where the agent represented that he was acting for a principal; secondly, the defendants are carrying on 3] the business of delivering \*telegraphic messages, and they are liable to any one dealing with them who is injured through their negligence in carrying on that business. In

(1) 7 E. & B., 301; 26 L. J. (Q.B.), 147; in Ex. Ch., 8 E. & B., 647; 27 L. J. (Q.B.), 215.

*Playford v. United Kingdom Telegraph Co.* (') the action was brought for a mere error in the delivery of a message, and negligence was not alleged; in the present case negligence is charged, and on demurrer it is admitted that there was negligence.

The defendants warranted that the message was correct, or at least that their agents would take every precaution to avoid mistake. In *Collen v. Wright* (') it was held that the plaintiff could sue an agent, because by purporting to act as agent he warranted that he was an agent; here the defendants, by delivering the message to the plaintiffs, warranted that they had authority to deliver the message. The general rule is that the representation must be false to the knowledge of the party making it in order to maintain an action on it. Upon this general rule an exception has been engrafted by *Collen v. Wright* (') that a person representing himself to be an agent impliedly contracts that he has the authority of his alleged principal. The defendants, in effect, warranted that they had the authority of Dickson, Robinson & Co. to deliver the message, and they warranted that the message was sent by them; it therefore falls within the principle of the exception, which has been established by *Collen v. Wright* (').

On the other point, as to negligence, if a person carrying on a business acts negligently in conducting that business, he is liable to any person dealing with him who is injured by his negligent act. The defendants, in carrying on their business, negligently delivered a message, which they knew might be mischievous if they delivered it to the wrong person. The telegram was supposed by the plaintiffs to be received, not from a stranger, but from persons who were in the habit of dealing with the defendants in the course of their business by means of a cipher, and it was the duty of the defendants to use the cipher with due care. This they failed to do, and therefore they are liable to compensate the plaintiffs for the injury sustained by them.

If the defendants are not liable in the present action very serious consequences will ensue. A telegraph company may deliver a message to a person for whom it is not [4 intended, and may with impunity cause very great injury to the person who receives it and is induced to act upon it. The consequence will be that telegraph companies will become careless in the conduct of their business, and very great public detriment will be sustained.

A great analogy exists between the liability of a common

(') Law Rep., 4 Q. B., 706.

147 : in Ex. Ch., 8 E. & B., 647; 27 L. J.

(') 7 E. & B., 301; 26 L. J. (Q.B.), (Q.B.), 215.

carrier and a telegraph company: Sedgwick on Damages, 6th ed., p. 443; *New York and Washington Printing Telegraph Co. v. Dryburgh* ('). A carrier is bound to deliver safely the goods intrusted to him, and a telegraph company are equally bound to transmit to the proper recipients the messages which they undertake to send along their lines.

*Watkin Williams*, Q.C. (*H. D. Greene* with him), for the defendants: *Collen v. Wright* (') forms no exception to the general rule that no action will lie for an innocent misrepresentation; the principle of that decision is that a person who, by representing himself to be an agent, invites another to enter into a negotiation with him, shall be held liable for the consequences if that representation turns out to be untrue. The law does not imply any warranty by a telegraph company that the messages sent by them are correct; and from the nature of the business it is plain that the company do not warrant that those whom they employ shall not commit mistakes; their servants and agents may often be ignorant of the real meaning of a message, and they have no power of ascertaining in what sense the words are to be understood by the intended recipient. It may be true that negligence on the part of the telegraph company was not charged in *Playford v. United Kingdom Telegraph Company* ('); but it is a fallacy to contend that this circumstance rendered that decision inapplicable, for negligence involves the omission of a duty, and here the defendants did not owe to the plaintiffs any duty, for no relation existed between them, and a duty can only be created either by law or by contract.

*Herschell*, Q.C., did not reply.

5] \*BRAMWELL, L.J.: I am of opinion that this judgment must be affirmed.

The general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. This general rule is admitted by the plaintiffs' counsel, and *prima facie* includes the present case. But then it is urged that the decision in *Collen v. Wright* (') has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that *Collen v. Wright* ('), properly understood, shows that there is an exception to that general rule. *Collen v. Wright* (') establishes a separate

(') 35 Penn. Rep., 298.

147: in Ex. Ch., 8 E. & B., 647; 27 L. J.

(') 7 E. & B., 301; 26 L. J. (Q.B.), (Q.B.), 215.

(\*) Law Rep., 4 Q. B., 706.

and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen v. Wright* ('). If so, it appears to me that it does not apply to the facts before us, because in the present case I do not find any request by the defendants to the plaintiffs to do anything. The defendants are simply the deliverers of what they say is a message from certain persons to the plaintiffs. No contract exists: no promise is made by the defendants, nor does any consideration move from the plaintiffs. It appears to me, therefore, that there is a distinction between this case and *Collen v. Wright* ('), and consequently we cannot have recourse to that case to take this out of the general rule to which I have referred.

But then it is argued that this is a case of misfeasance, that is, a case of negligence. Now the defendants' counsel made a remark which seemed to me very just, namely, that before any person can complain of negligence he must make out a duty to take care; and that that duty to take care can only arise in one of two ways, \*namely, either by con- [6 tract or by the law imposing it. That it does not arise by contract in this case is shown by the observations which I have already made for the purpose of pointing out that there is no contract between the plaintiffs and the defendants. Does that duty arise by law? If it did arise by law, the consequence would be that the general rule which has been admitted to exist is inaccurate, and that it ought to be laid down in these terms, that no action will lie against a man for misrepresentation of facts whereby damage has been occasioned to another person, unless that misrepresentation is fraudulent or careless. But it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness. It seems to me, therefore, that that point also fails the plaintiffs.

Further, the defendants did not guarantee that the message was authentic, and so far as they were concerned it might not be true. The action is not maintainable upon the ground of an implied warranty that the message was correct.

(') 7 E. & B., 301; 26 L. J. (Q.B.), 147: in Ex. Ch., 8 E. & B., 647; 27 L. J. (Q.B.), 215.

1877

Dickson v. Reuter's Telegram Company.

Another point raised was that the mistake was committed in the ordinary business of the defendants. I hardly know how that was made a separate ground of argument. Inaccuracy in a telegram is more likely to mislead than inaccuracy in a verbal statement: and the delivery of a telegraphic message is a more formal matter than the communication of a message by word of mouth. I cannot however see any distinction in principle between them.

It has been argued that if this action be not maintainable the consequences will be mischievous. I am not of that opinion. If it were held that a person is liable for a negligent misrepresentation, however *bona fide* made, a great check would be put upon many very useful and honest communications, owing to a fear of being charged, and perhaps untruly charged, with negligence. I do not think the rule upon which we are acting unreasonable either in itself or in its application to a telegraph company. It is to be recollected that a telegraph company are generally under some liability to the sender of the message, and if they are careless in delivering it and thereby occasion damage to him, he may maintain an action against them; and (apart from the natural desire to carry on their business properly so as to 7] gain customers) the \*existence of this liability is a kind of security for the proper delivery of the messages intrusted to the telegraph company.

I wish further to say that I do not see any analogy between the liability of a common carrier and that of a telegraph company. A carrier is liable both to the person who employs him and also to the owner of the goods: but the plaintiffs did not employ the defendants, and they are not the owners of the message. Possibly some analogy may exist between the present facts and a case where a carrier has delivered goods to a person, for whom they were not intended, and who has in consequence suffered some loss or inconvenience; but I do not think that under such circumstances an action would be maintainable against the carrier; for the person to whom the goods were delivered might have refused to receive them, and when he took them in he accepted the risk flowing from a possible mistake of the carrier.

In no point of view is the present action maintainable.

BRETT, L.J.: Upon consideration of the nature of the business of a telegraph company, it seems to me plain that all that they undertake to do is to deliver a message from the person who employs them, and that they perform the part of mere messengers; *prima facie*, therefore, their only



contract is with the person who employs them to send and deliver a message. In the present case the plaintiffs did not send the message, and therefore the defendants have made no contract with them. The defendants have in effect made a representation which is false in fact, but which they did not know to be false at the time of making it. If the case for the plaintiffs be simply that there was a misrepresentation upon which they have reasonably acted to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false. This seems to be admitted by the plaintiffs' counsel; it is urged, however, that *Collen v. Wright* (1) has introduced an exception to that rule; but after the argument of the defendants' counsel I have come to the conclusion that the decision in that case was founded upon a different and independent rule, which may be stated to be, that \*where a person [8 either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into upon that footing, he is liable to an action if he does not fill that character; but the liability arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation. Therefore the decision in *Collen v. Wright* (1) does not establish an exception to the rule that an innocent misrepresentation does not form the ground of an action. Now the telegraph company, being mere messengers, did not either expressly or impliedly invite the plaintiffs to act with them in any character, and the present facts do not fall within the principle of that case.

It was further suggested that the defendants are liable by reason of negligence; but when the argument for the plaintiffs as to negligence is examined, it is found to be based upon the doctrine, that where a person has been led by the negligence of another to act under the belief of a certain state of facts and in consequence has suffered detriment, the person guilty of negligence is liable to make good that loss; but this doctrine properly applies to cases of estoppel; and the facts before us do not allow the plaintiffs to rely upon the defendants' negligence as a ground of estoppel: *Swan v. North British Australasian Company* (2).

I cannot see that any liability rests upon the defendants, and therefore I think that the judgment of the Common Pleas Division should be affirmed.

(1) 7 E. & B., 301; 26 L. T. (Q.B.), 147; in Ex. Ch., 8 E. & B., 647; 27 L. J. (Q.B.), 215.

(2) 2 H. & C., 175; 32 L. J. (Ex.), 273.

1877

Dickson v. Reuter's Telegram Company.

COTTON, L.J.: I also am of opinion that the judgment of the Common Pleas Division should be affirmed.

The authority most relied on by the plaintiffs' counsel was *Collen v. Wright* (\*). Now it is quite clear that the decision in that case went upon the ground that the testator of the defendants by his conduct impliedly warranted that he had the authority which he professed to have; and this is plain from the language of Willes, J., in delivering the judgment of the Exchequer Chamber(\*). Now the principle of that [9] case cannot apply here. The \*defendants did not enter into a contract with the plaintiffs, nor did they represent that they had any authority to act as agents for the plaintiffs' Liverpool house: they simply delivered the message and left the plaintiffs to act or not to act upon it, as they pleased; therefore it cannot be said that in consequence of a request by the defendants the plaintiffs undertook any liability or were induced in any way to act upon the message. There being no contract between the parties to the present suit, *Collen v. Wright* (\*) is distinguishable.

It was further contended for the plaintiffs that the defendants were liable by reason of their negligence. It was admitted that misrepresentation alone would not have supported an action; but it was contended that, owing to the nature of the business carried on by the defendants, they were bound to warrant the accuracy of the message, or at least to guarantee that every precaution had been taken by their agents to avoid mistake, and that the message was sent by the persons by whom it purported to be sent. I cannot concur in this argument. A person comes into a telegraph office and writes out a message to be forwarded by the company; how can the company ascertain whether the person in whose name the message is sent has really authorized its transmission? It is impossible to suppose that the company in the ordinary course of their business warrant that the message comes from a particular person; for they would thereby make a representation, the truth of which in many cases they cannot ascertain.

*Judgment affirmed.*

Solicitors for plaintiffs: *G. L. P. Eyre & Co.*, agents for Garnett, Tarbet & Tinne, Liverpool.

Solicitors for defendants: *Johnsons, Upton & Budd.*

(\*) 7 E. & B., 301; 26 L. J. (Q.B.). (2) 8 E. & B., 647, at pp. 657, 658; 27 147; in Ex. Ch., 8 E. & B., 647; 27 L. J. L. J. (Q.B.), 215, at pp. 217, 218. (Q.B.), 215.

We cannot ascertain that this case went to the House of Lords.

See 2 Thompson on Neg., 828, 835 note : 5 Leg. News, 84.

While a telegraph company may, by special agreement or by reasonable rules and regulations, limit its liability to damages for errors and mistakes in the transmission and delivery of messages, it cannot stipulate or provide for immunity from liability where the error or mistake results from its own negligence. Such a stipulation or regulation being contrary to public policy.

Where, in an action against the company for damages resulting from an inaccurate transmission of a message, such inaccuracy is made to appear, the burden of proof is on the company to show that the mistake was not attributable to its fault or negligence.

The defendant's agent sent to them from Woodstock, Ontario, a message in these words: "Will you give one fifty for twenty-five hundred at London. Answer at once as I have only till night." The court instructed the jury, that the message was not in cipher or obscure, within the meaning of a stipulation in the agreement under which the message was sent; the company "assumed no liability for errors in ciphers or obscure messages."

Held, that the instruction was correct: *Western Union, etc., v. Griswold*, 7 Cinn. L. Bull., 1, Sup. Ct. of Ohio.

Such damages only are recoverable as the parties either actually contemplated, or may be fairly supposed to have contemplated, as flowing from the breach.

Where the damage claimed is a loss of that which might have been obtained, depending on the contingency of a certain expected action of a third party in the event of the contract being carried out, it is too remote to be

regarded as within the contemplation of the party breaking the contract: *McColl v. Western Union Telegraph Co.*, 44 N. Y. Super. Ct. R., 487.

Dispatch as follows: "Can close Valkyria and Othere, 22 20 net, Montreal. Ans. immediately." Held, that commissions which the sender would have earned as a broker in effecting a charter of two vessels named Valkyria and Othere, if the message had been duly transmitted, were not damages either actually contemplated, or to be fairly supposed to have been contemplated by the defendant, and therefore not recoverable: *McColl v. Western Union Telegraph Company*, 44 Super. Ct. Rep., 487.

Plaintiff sent a dispatch in relation to bonds which concluded: "Hatch says hold undoubted." As delivered it read, "Hatch says sold undoubted." Plaintiff's agent being unable to find the last word in his dictionary, and without having the message repeated or making inquiry, sold the bonds. In an action to recover damages for defendant's negligence, held, that the sale was attributable to the negligence of plaintiff's agent in omitting inquiry and acting on conjecture, and not the fault of defendant in missending the dispatch: *Hart v. Direct U. S. Cable Co., Limited*, 13 N. Y. Weekly Dig., 269, Ct. Appeals.

In Lower Canada, under the code of that province, a telegraph company is responsible to the receiver of a telegram for damages caused to him by an error which occurs by the negligence of an employe in the transmission of an unrepeatd message; even where the sender of the telegram writes it on a blank form on which is printed a condition that the company will not be responsible for mistakes in the transmission of unrepeatd messages: *Watso v. Montreal Telegraph Co.*, 5 Leg. News, 87, and see *Id.*, p. 84.

[3 Common Pleas Division, 10.]

Nov. 12, 1877.

[IN THE COURT OF APPEAL.]

10]

\*SMITH V. WIDLAKES and Others.

*Vendor and Purchaser—Conveyance of Fee Simple subject to Void Lease for Years—Right of Purchaser taking with Notice of Void Lease to enter upon Hereditaments held under it—Landlord and Tenant—Evidence of Tenancy from Year to Year—Effect of Acceptance of Nominal Rent for Hereditaments of Substantial Value.*

A tenant for life without leasing power demised a plot of building land for the term of sixty years, from the 29th of September, 1834, at the annual rent of sixpence; the lease contained a covenant by the tenant for life for quiet enjoyment. The lessee accordingly erected a house on the plot of land. After the death of the tenant for life the fee simple ultimately vested in H., who accepted rent at the rate above mentioned from J., who was a son of the original lessee, and was then in possession of the house. H. afterwards conveyed the house and land to the plaintiff by indenture: the grant was made expressly subject to the supposed term of sixty years. No notice to quit had been given, and the annual value of the house and land was about £6. The plaintiff having sued to recover possession of the house and land:

*Held*, that as the representatives of the original lessee, under the indenture of the 29th of September, 1834, could not have sued H. for breach of the covenant for quiet enjoyment, the void lease afforded no defence against the plaintiff claiming under the grant of the fee simple subject to it; that a tenancy from year to year had not been created by the payment of rent at the rate of sixpence a year: and that the plaintiff was entitled to immediate possession of the house and land.

*Prettyman's Case* (2 Vern., 279, cited in *Walton v. Stamford*, *Ibid.*) commented upon.

ACTION to recover possession of two cottages and a garden thereto attached. The writ was issued on the 30th of January, 1877. The defendants, Widlake and Latham, were the tenants in possession: the defendant, J. A. Thorne, defended as landlord.

At the trial, before Cockburn, C.J., without a jury, at the Bristol Spring Assizes, 1877, the following facts were proved:

By indentures of lease and release, dated respectively the 22d and 23d of December, 1814, being a settlement executed upon the marriage of John Harris and Elizabeth Winifred Bird, certain lands, including a field called Eight Acres, situate in the parish of Eastdown, in the county of Devon, were conveyed to John Harris for life, with remainder to E. W. Bird for life, with remainder to the children of J. Harris and E. W. Bird, for such \*estates and in such shares as they should jointly appoint, and in default of a joint appointment as the survivor of J. Harris and E. W. Bird should by deed or will appoint, and in default of any appointment to the children of J. Harris and E. W. Bird

in fee as tenants in common. The settlement contained other limitations and provisions which it is unnecessary to mention; but it did not contain any power to grant leases.

The marriage was afterwards solemnized.

By an indenture of lease, dated the 29th of September, 1834, John Harris and Elizabeth Winifred, his wife, demised unto Francis Maine a plot of land, being parcel of Eight Acres, and containing about forty-two perches, from the date of the indenture for the term of sixty years, at the yearly rent of 6*l.* The lease contained amongst others a covenant by F. Maine to erect within three years a dwelling house on a plot of land, and also a covenant by J. Harris for himself and his wife for quiet enjoyment. It also contained a power of re-entry for non-payment of rent, for omission to repair after notice, and for using the dwelling house as a public house. F. Maine accordingly erected a dwelling house upon the plot of ground, which was afterwards used as two cottages, and formed the buildings sought to be recovered in the action.

John Harris died in 1835 without having exercised the joint power of appointment conferred upon him by the settlement dated December, 1814. By her will, dated July, 1844, as altered by a codicil dated November, 1854, E. W. Harris, intending to execute the power of appointment reserved to her as the survivor of her husband, devised in fee the lands conveyed by the settlement dated December, 1814, in substance, as follows: one-fifth to her son, T. B. Harris; one-fifth to her son, John Harris; one-fifth to her son, W. H. Harris; one-fifth to T. B. Harris in trust for her daughter, M. A. Gregory; and one-fifth to W. W. Gregory in trust for the children of a deceased daughter, E. W. Gregory. The devises were subject to the condition that if the devisees should wish to sell the lands during the lifetime of her son, James Harris, the offer of purchase should be first made to him at the sum of £1,000. The testatrix died in May, 1865, having had six children only by her deceased husband, namely, the \*above mentioned [12 James Harris, T. B. Harris, John Harris, W. H. Harris, M. A. Gregory, and E. W. Gregory, deceased.

By an indenture dated the 7th of June, 1866, after reciting that T. B. Harris, John Harris, W. H. Harris and M. A. Gregory, had determined to confirm the invalid appointment purported to be made by their mother to W. W. Gregory in favor of the children of the said E. W. Gregory, and that it had been agreed to sell to James Harris the hereditaments thereby conveyed at the price of £1,000, T.

1877

Smith v. Widlake.

B. Harris, John Harris, W. H. Harris, W. W. Gregory, and M. A. Gregory, granted unto James Harris in fee, the lands conveyed by the settlement of December, 1814.

By indenture dated the 22d of June, 1866, James Harris mortgaged in fee the lands granted to him by the indenture dated the 7th of June, 1866, to secure a loan of £1,000. The deed contained the usual mortgage powers.

By an indenture dated the 2d of April, 1874, the then mortgagees of James Harris by his direction granted, and he himself granted and confirmed, to the plaintiff in fee the lands conveyed in the settlement dated December, 1814. It was amongst other things recited that James Harris had agreed with the plaintiff "for the absolute sale to him of the hereditaments intended to be hereby granted, and the inheritance thereof in fee simple in possession free from incumbrances (except only the indenture of lease hereinafter mentioned) at the price of £1,350;" in the *habendum* the lands were declared to be absolutely discharged from the mortgage debt of £1,000, "but subject as to the house and garden mentioned in the said first schedule to a certain indenture of lease thereof for a term of sixty years, from the        day of       , 1834," (sic) and the covenant against incumbrances by James Harris contained an exception as to "the said indenture of lease."

The house and garden mentioned in the first schedule were the cottages and garden sought to be recovered in this action.

James Harris had after the death of his mother accepted rent for the cottages and garden at the rate of 6*d.* a year from James Mayne, a son of Francis Mayne, and by a receipt dated the 21st of July, 1872, he acknowledged the receipt from J. Mayne, of "the sum 2*s.* 6*d.* for chief rent" [13] for the cottages. The real value of the \*cottages and garden was about £6 a year. J. Harris was aware of the lease dated the 29th of September, 1834, and wished to treat it as valid. In August, 1876, the plaintiff demanded that the tenants of the cottages should attorn to him; but this they did not do.

At the trial Cockburn, C.J., ordered judgment to be entered for the defendants<sup>(1)</sup>.

The plaintiff appealed.

<sup>(1)</sup> The only document put in at the trial on behalf of the defendants was the lease dated the 29th of September, 1834, and no other evidence as to the title of the defendant J. A. Thorne

was then given; but in point of fact the original lessee Francis Mayne made a will (which, however, was never proved), bequeathing the cottages and garden in trust for six of his children;

Nov. 8. *H. T. Cole, Q.C., and G. Pitt Lewis*, for the plaintiff: At the commencement of the action twenty years had not elapsed since the death of E. W. Bird the last tenant for life; and therefore the plaintiff, who is tenant in fee of the cottages and garden, is *prima facie* entitled to the possession thereof. The term for sixty years, being created by mere tenants for life without leasing power, is of course *prima facie* void against those entitled to the inheritance; but it will be contended for the defendants that, as the grant by James Harris and his mortgagees treats the lease as subsisting, the plaintiff who claims under it cannot recover possession of the cottages and garden until the term has expired by effluxion of time or been forfeited; but this contention is plainly erroneous, for it is directly at variance with the decision in *Doe d. Potter v. Archer* <sup>(1)</sup>. It has been said that in equity the purchaser of land conveyed subject to a void lease cannot eject an occupier claiming under it, if the vendor is entitled to be indemnified by the purchaser: Sugden on Vendors and Purchasers, \*ch. xxiii, s. 2, par. 4, [14 pp. 750, 751 (14th ed.)]; but that doctrine does not apply here, for James Harris has no claim to be indemnified by the plaintiff. For the defendants, reliance may be placed upon *Prettyman's Case* <sup>(2)</sup>, but in that case it does not appear under what circumstances the purchase was made, and it may well be that the supposed tenant for life, or perhaps the vendor, had an equity to compel the purchaser to allow the property to be enjoyed as if a valid grant had been made. The mere acceptance of rent by James Harris did not confirm the void lease: *James d. Aubrey v. Jenkins*, Buller's Nisi Prius, part 1, bk. 3, ch. ii, p. 96 b (7th ed.).

*A. Charles, Q.C. (C. Murch, with him)*, for the defendants: *Prettyman's Case* <sup>(2)</sup> is clearly in point, and the court cannot give judgment for the plaintiff without overruling it. The plaintiff by the very terms of the conveyance to him had notice that the void lease existed as an incumbrance upon the freehold; and as he is now seised in fee,

some of these children conveyed their shares to their brother James Mayne, who assigned his interest to the defendant J. A. Thorne. Francis Mayne died in 1848.

<sup>(1)</sup> 1 B. & P., 531. In this case, decided in 1796, the conveyance was by indenture and described the void lease, and it was contended that by the terms of the conveyance a valid demise was created; the court gave

judgment against this contention on the ground that the intended lessee not being a party to the indenture could not take a present interest under it; but see now as to indentures executed after the 1st of October, 1845, the first clause of s. 5 of 8 & 9 Vict. c. 106.

<sup>(2)</sup> 2 Vern., 279, cited in *Walton v. Stamford*, Ibid.

1877

Smith v. Widlake.

he can confirm the original demise, and therefore in equity he is bound to treat it as valid for the term originally created: *Taylor v. Stibbert* ('). The plaintiff probably at the time of the purchase paid a less sum for the property on the ground that the cottages and gardens were held under the lease for sixty years, and the grant to him in terms only conveys a reversion, and therefore he cannot enter until the expiration of the term intended to be created.

[COTTON, L.J.: It does not appear that the representatives of Francis Mayne have any remedy against James Harris, who had power to eject them; and it would follow from that argument that James Harris, and not Thorne, would be entitled to the possession for all the residue of the term.]

At all events a tenancy from year to year was created when James Harris accepted rent at the rate mentioned in the lease for sixty years; therefore the defendants were entitled to at least six months' notice to quit, and this not having been given, the present action must fail: *Doe d. Martin v. Watts* (').

*H. T. Cole, Q.C., in reply.*

*Cur. adv. vult.*

15] \*Nov. 12. The following judgments were delivered:

BRAMWELL, L.J.: I will first dispose of the question whether the payment of rent to James Harris created a tenancy from year to year, and therefore whether the plaintiff, who claims through him, was bound to give a six months' notice to quit before he could maintain an action to recover possession of the property in dispute. The annual value of the two cottages appears to be about £6, but the rent received by James Harris was only at the rate of 6*d.* a year, and in the receipt given by him the rent is described as "chief rent." The counsel for the defendants cited *Doe d. Martin v. Watts* (') as an authority against the plaintiff, but it is plain, upon looking into the decisions upon the question, that the payment of rent is at most only evidence of a tenancy from year to year; and upon the facts before us I am of opinion that James Harris did not accept the sum of 2*s.* 6*d.* as rent due upon a five years' occupation under a tenancy from year to year, but that he received it under the mistaken notion that he had power to confirm the void lease for sixty years. The acceptance of this sum, no doubt, would prevent James Mayne from being treated as a tres-

(') 2 Ves. Jun., 487.

(') 7 T. R., 88.

(') 10 East, 158.



passer, and he seems to have become tenant at will in the strict sense of the term ; but I do not think that a tenancy from year to year was created between him and James Harris. I may say that *Roe d. Brune v. Prideaux* (<sup>1</sup>), and *Denn d. Brune v. Rawlins* (<sup>2</sup>), entirely support the view which we take of the facts before us.

It was also argued that, as the grant to the plaintiff was made expressly subject to the void lease, he is not entitled to possession until the expiration of the term intended to be created by the indenture dated the 29th of September, 1834 ; but he, as grantee under the indenture dated the 2d of April, 1874, takes all that his grantors could convey, and as the supposed term did not exist, he became seised in fee of the cottages and garden free from incumbrances, and with the right to immediate possession. For the defendants, reliance was placed upon *Prettyman's Case* (<sup>3</sup>). As to this case, I need only remark that it does not appear what the \*circumstances of the case really were, and it may well [16 be that the intended grantee of the estate for life had an equity sufficient to entitle him to a decree that he should enjoy the land. The defendants' counsel also relied upon a principle which appears to be established by certain decisions in equity, and seems to be of the following nature, namely, that where an ineffectual lease has been granted by a tenant for life who afterwards joins with the remainderman in selling the hereditaments to a purchaser with full notice of the agreement, the latter is liable to be restrained from ejecting those claiming under the lease ; but the ground of this doctrine is that the tenant for life was bound to grant a valid interest to the lessee, and as the purchaser has notice of the contract, and takes an estate which enables him to perform it, he is bound to make good the term intended to be created ; for otherwise the lessee would be able to maintain an action against the tenant for life ; and in order to avoid this, equity compels the purchaser to leave the lessee in possession. But it is unnecessary to consider the extent of this doctrine, for it has no bearing upon the present facts ; neither of the tenants for life who granted the lease in 1834 conveyed to the plaintiff ; he does not claim through either of them ; the vendor, James Harris, is not liable to an action for breach of the covenant for quiet enjoyment contained in that lease, and he cannot be sued by those who represent Francis Mayne, the original lessee, and therefore the defend-

(<sup>1</sup>) 10 East, 158.

(<sup>2</sup>) 10 East, 261.

(<sup>3</sup>) 2 Vern., 279, cited in *Walton v. Stamford*, *Ibid*.

1877

Smith v. Widlake.

ants cannot successfully defend upon the principle which I have mentioned.

I am, therefore, of opinion that the judgment must be reversed.

BRETT, L.J., concurred.

COTTON, L.J.: I think it clear that no tenancy from year to year was created.

It has been argued that the plaintiff cannot recover possession of the cottages and garden until the expiration of sixty years from the 29th of September, 1834, because the conveyance to the plaintiff in the recitals, in the *habendum*, and in the covenant against incumbrances, recognizes as valid the indenture of lease dated as of that day; and that the deed must therefore be construed as confirming the void [17] lease or creating a new lease for the remainder \*of the term of sixty years. In support of this argument, reliance has been placed upon *Prettyman's Case* (1). The facts of that case are very shortly stated. It is not reported, but merely referred to in the case of *Walton v. Stamford* (2). Probably the decision was on the ground that the intended grantee for life had a claim against the vendor, and therefore against the purchaser as taking with notice. But whatever may be the true explanation of that case, I cannot recognize it as an authority in favor of the defendants' contention as to the construction and effect of the conveyance to the plaintiff. In my opinion that conveyance on its true construction refers to the lease of 1834, merely for the purpose of excepting it from the covenant against incumbrances. It has also been argued that in equity, where a fee simple is granted subject to a void lease for years, the grantee will be restrained from taking any steps to put an end to the term, and will be compelled to confirm it; but upon reference to the authorities it will be found that in them the grantor of the hereditaments conveyed has contracted to create a term of years, or is liable to an action at the suit of the intended lessee if the latter is ejected from the land agreed to be demised to him, and the ground of the decisions is that the purchaser taking with notice is bound to complete the contract or to indemnify his vendor against the action, or, in other words, is bound to save him from being sued. The doctrine does not apply to the facts before us; James Harris, who conveyed to the plaintiff, is

(1) 2 Vern., 279, cited in *Walton v. Stamford*, *Ibid*.

(2) 2 Vern., 279.

not exposed to any action at the suit of those representing the original lessee.

*Judgment reversed.*

Solicitors for plaintiff: *Kennedy, Hughes & Kennedy*, for R. I. Bencraft, Barnstaple.

Solicitors for defendants: *Church, Sons & Clarke*, for J. A. Thorne, Barnstaple.

See 26 Eng. Rep., 471 note.

Where a deed remising and releasing premises, contains a covenant that the grantor, his heirs, etc., shall warrant and defend the title to the premises to the grantee, his heirs and assigns forever, against all lawful claims of all persons claiming under the grantor, and the *habendum* clause provides that the grantee, his heirs and assigns, shall have and hold the premises, etc., forever, it will be a conveyance of the fee, and not a simple release, so that a title subsequently acquired by the grantor will enure to the grantee unless it is derived from sale under an incumbency assumed by the grantee: *People ex rel. Weber v. Herbel*, 96 Ills., 384.

Under a deed, by husband and wife, of the wife's lands, with covenants of warranty by both, a title afterwards acquired by the husband enures by way of estoppel to the grantee, as against the grantor and all persons who hold under the grantor's deed given after the subsequent title is acquired.

Such after-acquired title descends to any person who holds under the first grantee, however remote from him in the line of title, and the succession is not broken by some of the intervening deeds conveying only "the right, title and interest in the land," which the grantors had, such mode of conveyance being equivalent to a release deed at least: *Powers v. Patten*, 71 Maine, 583.

The sale of an interest in a patent by one not having any title thereto, will operate by way of estoppel against him in case he subsequently acquires title; but the court declines to decide whether it would have such effect against his part-owners: *Gottfried v. Miller*, 3 Morrison's Trans., 644, Sup. Ct. U. S.

Where a party gives a deed or mort-

gage on land, the title to which fails, and the grantor or mortgagor afterwards acquires the title by deed, giving a mortgage back as a part of the same transaction, to secure the purchase-money, he will not, in equity, become seized of the title so subsequently acquired, in such a manner that it will enure to his former grantee or mortgagee under the covenants of title in his deed or mortgage, as against the second mortgagee. When a mortgage is in the statutory form it is equivalent to one containing all the covenants of title, and any title the mortgagor may subsequently acquire will enure to the benefit of the mortgagee in the same condition the mortgagee took the same, and will revive such mortgage, if extinguished by sale under a prior lien, to the extent of such newly-acquired title, but no further: *Elder v. Derby*, 98 Ills., 228.

A deed not purporting to convey an estate in fee simple absolute in lands, as, where it remises, releases and quit claims to the grantee, his heirs and assigns forever, all the right, estate, title and demand whatsoever which the grantor has, or ought to have, to the property, is not such a conveyance as that an after-acquired title of the grantor will enure to the grantee under our statute on that subject.

If one conveys lands or real estate with a general covenant of warranty against all lawful claims and demands, he cannot be allowed to set up, as against his grantee or those claiming under him, any title subsequently acquired, either by purchase or otherwise, but such new title will enure, by way of estoppel, to the use and benefit of his grantee, his heirs and assigns.

But where the deed on its face does not purport to convey an indefeasible estate, but only the right, title and interest of the grantor, although the deed may contain a general covenant

1877

Le Tailleur v. South Eastern Railway Co.

of warranty, the doctrine of estoppel will not apply so as to pass an after-acquired estate to the grantee. The covenants of warranty in a deed are limited and restrained by the estate conveyed on the face of the deed. Where a deed released to the grantee "all such right, estate, title and demand whatsoever," as the grantor had, "or ought to have," in and to the lots, "to have and to hold the above described premises," so that neither the grantor nor his heirs should claim any "title to the premises or any part thereof," it was held only a release of such right as the releasor had at the time, and not as purporting to convey the lots. The words "or ought to have" are unmeaning, and may be rejected. It was also held, that the word "premises" in the *habendum* means only what the deed purports to convey, and not the absolute title.

Where a party conveys only such estate and interest as he has in land, the title of which is at the time in the United States, such interest, whatever it may be, will terminate upon the purchase of the land from the United States. Where the grant in a deed is of all the grantor's right, title and interest in land, and not of the land itself or any particular estate therein, a warranty of the premises extends

only to the estate granted, which is all the grantor's right, title and interest. It will be confined to the estate vested in the grantor at the time the deed was made: *Holbrook v. Debo*, 99 Ills., 372.

Where one who has no title makes a mortgage, which is recorded, and subsequently acquires title, a subsequent purchaser is not chargeable under our registry acts with constructive notice of the mortgage.

The doctrine of title by an estoppel binding the second mortgagee cannot be invoked in this case by B., inasmuch as T. H. already had title when he gave the mortgage to B., and the second deed to T. H. was nugatory: *Bingham v. Kirkland*, 34 N. J. Eq., 229.

The fact that a wife unites with her husband in a deed, whereby he conveys his land, does not operate as an extinguishment of a mortgage thereon held in trust for her: *Hatz's Appeal*, 40 Penn. St. Rep., 299, followed.

A married woman cannot be estopped by the expression of her opinion as to the legal effect of a writing which she was about to execute, although the other party may have been misled and injured thereby: *Klein v. Caldwell*, 91 Penn. St. Rep., 140.

[3 Common Pleas Division, 18.]

Nov. 27, 1877.

## 187 \*LE TAILLEUR V. THE SOUTH EASTERN RAILWAY COMPANY.

*Lord Mayor's Court, London.—Case argued on Evidence before the Judicial Committee—20 & 21 Feb. & March 1878.*

The South Eastern Railway Company have a station in Cannon Street, City, where a considerable portion of their business is transacted. Their principal station, which is the terminus of the London and Chatham line, and the principal and substantial business of the company is conducted at this station.

It is at this station, and thereby in the course of the business, that the jurisdiction of the Mayor's Court, within the meaning of s. 11 of the Mayor's Court Extension Act, 1872,

*Le Tailleur v. South Eastern Railway Co.* 11 L. J. Q. B., 118, followed.

[3 Common Pleas Division, 26.]

Nov. 27, 1877.

\*PHILLIPS V. HENSON.

[26]

*"Lodger"—Lodgers' Goods Protection Act, 1871, 34 & 35 Vict. c. 79.*

By an agreement in writing the plaintiff hired from F. rooms in a house held by her under an unexpired lease from the defendant, for which the plaintiff was to pay F. £27 10s. per quarter, she paying rates and taxes, and keeping the premises in repair. The rooms so hired by the plaintiff substantially constituted the whole house, F. only retaining possession of the housekeeper's room on the basement and of two or three empty attics and a stable. Rent being due from F. to the defendant, the latter distrained and sold household furniture belonging to the plaintiff, who, relying upon the provisions of the Lodgers' Goods Protection Act, 1871, sued him for an illegal distress:

*Held*, that, although the agreement under which he held might make him an "undertenant," the plaintiff plaintiff was not the less a "lodger" entitled to the protection of the statute.

[3 Common Pleas Division, 32.]

Dec. 1, 1877.

[IN THE COURT OF APPEAL.]

\*JOHNSON V. THE CREDIT LYONNAIS COMPANY. [32]

JOHNSON V. BLUMENTHAL.

*Factors Acts—Agent intrusted with the Possession of Goods—Agent Broker and also Merchant—Goods left in possession of Paid Vendor—Pledge—6 Geo. 4, c. 94, s. 2.*

H., a merchant dealing in tobacco and a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the K. dock. The warrants for them had been issued to him. The plaintiff bought the tobacco from H. and paid for it, but he left the dock warrants in the possession of H., and took no steps to have any change made in the books of the dock company as to the ownership of the tobacco. H. being the ostensible owner of the tobacco fraudulently obtained advances [33 on the pledge of a portion of the tobacco from the defendants respectively, and handed to them the dock warrants. Both the defendants acted in good faith, and took fresh dock warrants from the dock company:

*Held*, that H. was not intrusted by the plaintiff as his factor or agent with the documents of title, within 6 Geo. 4, c. 94, s. 2; and that the conduct of the plaintiff, in leaving the indicia of title in H.'s hands and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover its value from the defendants.

APPEAL by the defendants, the Credit Lyonnais Company, from a judgment of Denman, J., in favor of the plaintiff<sup>(1)</sup> after trial without a jury; and also appeal of the defendant Blumenthal from a judgment of Field, J., in favor of the plaintiff after trial with a jury.

These cases were by order argued together; the facts were

<sup>(1)</sup> 2 C. P. D., 224; 20 Eng. R., 486.

1877

Johnson v. Credit Lyonnais Co.

the same in both as well as the questions of law arising thereupon. The facts are fully set out in the report in the court below, and are sufficiently stated in the judgment of the Court of Appeal and in the head-note above.

1877. June 9, 27, 29. *Thesiger*, Q.C., and *Bigham*, for the plaintiff in each case.

*Benjamin*, Q.C., and *Woolf* (*Watkin Williams*, Q.C., with them), for the defendants the Credit Lyonnais Company.

*Philbrick*, Q.C., and *Woolf*, for the defendant *Blumenthal*.

Two questions were discussed. First, whether *Hoffmann* was an agent intrusted with the documents of title relating to the tobacco, within the meaning of 6 Geo. 4, c. 94, s. 2, and 5 & 6 Vict. c. 39, s. 1. Secondly, whether the conduct of the plaintiff by leaving the indicia of title in *Hoffmann's* possession—he being a tobacco dealer—gave him an apparent right to deal with the tobacco as his own, and whether the plaintiff was thereby estopped from saying that the tobacco was his.

The arguments were the same in both cases, and are fully noticed in the judgments.

In addition to the cases mentioned in the judgments the following cases were cited. On the first point, *Baines v. Swainson* (¹), *McEwen v. Smith* (²), *Monk v. Whittenbury* (³), 34] *Phillips v. Huth* (⁴), \**Hatfield v. Phillips* (⁵), *Wood v. Rowcliffe* (⁶), *Heyman v. Flewker* (⁷), the judgment of Lord Westbury in *Vickers v. Hertz* (⁸). On the second point, *Rumball v. Metropolitan Bank* (⁹).

*Cur. adv. vult.*

Dec. 1. The following judgments were delivered :

COCKBURN, C.J.: These cases come before us on appeal: the first from a judgment of Mr. Justice Denman, after a trial before himself without a jury; the second from a judgment of Mr. Justice Field, after a trial with a jury.

The facts, as well as the questions of law arising thereupon, were the same in both actions. The facts were as follows:

One *Hoffmann*, a broker in the tobacco trade, but who also dealt in tobacco as an importing merchant, having imported a quantity of that article, left it in bond in the ware-

(¹) 4 B. & S., 270; 32 L. J. (Q.B.), 281.

(⁵) 6 Hare, 183.

(²) 2 H. L. C., 309.

(⁷) 13 C. B. (N.S.), 519; 32 L. J. (C.P.),

(³) 2 B. & Ad., 484.

132.

(⁴) 6 M. & W., 572.

(⁸) 2 H. L. (Sc.), p. 118.

(⁶) 12 Cl. & F., 343.

(⁹) 2 Q. B. D., 194.

houses of the St. Katharine's Dock Company, receiving the usual dock warrants; and the tobacco was entered in the books of the company as that of Hoffmann.

This tobacco Hoffmann sold to the plaintiff, who carried on the business of a tobacco manufacturer at Bolton, in Lancashire; but it not suiting the plaintiff's purpose to take the tobacco out of bond, which would have involved the necessity of paying the duty before he wanted the tobacco, he did what it appears is frequently, but not always, done in the tobacco trade by purchasers, in order to avoid the immediate payment of the duty: he left the tobacco in bond in the name of Hoffmann, and left the dock warrants in Hoffmann's hands, and took no steps to have any change made in the books of the dock company as to the ownership of the goods.

According to the plaintiff's statement, he was ignorant of the fact that, when goods are thus deposited in the warehouses of the dock company, dock warrants are issued to the party depositing, which represent the goods, and are capable of being transferred, so as to enable the transferee to obtain possession of the goods.

Being thus the ostensible owner of the tobacco, Hoffmann fraudulently obtained advances, on the pledge of a portion of it, \*from the Credit Lyonnais Company, the de- [35  
fendants in one of these actions, and from Blumenthal, the defendant in the other; both these parties acting in perfect good faith, under the belief, induced by his being in possession of the goods and of the indicia of ownership, that Hoffmann was the owner of the tobacco. Each of the defendants on the completion of the transaction, proceeded to do that which, as it seems to me, the plaintiff, as a matter of common prudence, should have done. They caused the entry of the goods to be transferred from the name of Hoffmann to their own in the books of the dock company, and took fresh dock warrants from the company, giving up the former ones. The transactions between Hoffmann and the defendants were wholly unknown to the plaintiff. He further stated, as I have already mentioned, and the statement does not appear to have been questioned, that he was unaware of the practice of giving dock warrants as evidence of the title of the party to whom they are given, or of the transfer of such warrants on alienation of the property.

Upon this state of facts, Mr. Justice Denman, in the action against the Credit Lyonnais Company, gave judgment in favor of the plaintiff for the value of the tobacco pledged to the defendants. In the action against Blumenthal—the

1877

Johnson v. Credit Lyonnais Co.

defence on the ground of estoppel or negligence having been abandoned by the counsel for the defendant—Mr. Justice Field put the question to the jury whether authority, or ostensible authority, had been given by the plaintiff to Hoffmann to deal with the goods as owner, or to pledge them as agent; and on the jury answering in the negative gave judgment in like manner for the plaintiff.

Two questions are raised by the defendants: the first, whether the case comes within the Factors Acts; the second, whether the conduct of the plaintiff, in leaving the indicia of title in Hoffmann's hands, and thus enabling him to obtain money on the security of this tobacco, has been such as to disentitle him to recover its value from the defendants.

Upon the first question, namely, whether the case comes within the Factors Acts, I entertain no doubt. I consider it to be settled by the authority of decided cases; but I may add that if the question had presented itself now for the 36] first time, it being clear to \*my mind that Hoffmann was not "intrusted" with these goods, or with the documents of title relating to them, as agent to sell or consign, or indeed as agent in any sense, but stood only in the position of a paid vendor remaining in possession of the thing sold till it suited the convenience of the buyer to accept delivery, I should have had no hesitation in arriving at the same conclusion.

The other question, namely, whether the plaintiff, having not only by leaving the goods in the possession of Hoffmann, but also by leaving with him the indicia of ownership, enabled him to dispose of the goods, as apparent owner, to the defendants, can recover the value from them, is a far more difficult question, and one on which I have entertained considerable doubt.

That Hoffmann having thus, by being left in undisturbed possession of the goods and the indicia of ownership—there having been nothing to raise a doubt as to the latter, or any means open to the defendants to ascertain the fact—been enabled to defraud one of two innocent parties, when the question arises as to which of them the loss should fall upon, in reason and justice the loss ought to fall on him who might have prevented, and as a matter of common prudence ought to have prevented, the possibility of the fraud, is what I cannot bring myself to doubt. And I am strongly fortified in this view by the fact that, as soon as the decisions here appealed from had been made public, the Legislature by statute (40 & 41 Vict. c. 39) at once proceeded to settle the question in that view in the future by applying



the protection given by the Factors Acts to persons acquiring title from agents, to innocent parties purchasing or making advances in such cases as the present. Whether, prior to and independently of such legislation, the law as it stood would have afforded protection is a different matter. I have come, though, I confess, with reluctance, to the conclusion that, as the law stood, this action could not be resisted, and consequently that this appeal must be dismissed.

The case for the plaintiff rests on the general proposition of law—which as a general proposition cannot be contested—that the mere possession of the property of another, without authority to deal with the thing in question otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest \*the owner of [37 his rights as against the third party, however innocent in the transaction the latter party may have been.

The defendants, on the other hand, insisted on two grounds as taking the case out of the general rule: first, that the plaintiff, by leaving the possession of the goods and the indicia of property in the hands of Hoffmann, had enabled the latter to pledge the goods to them, and was therefore estopped from denying the right of Hoffmann so to deal with them; secondly, that, even if the property in the tobacco still remained in the plaintiff, so as to entitle him to recover its value, on the other hand, the plaintiff had in the conduct in question been guilty of negligence by which the defendants had been induced to deal with Hoffmann as the owner of the tobacco, and to pay him for it; by reason of which they were entitled to recover back the amount by way of counter-claim, or what would come to the same thing, to set it off in the present action.

There have been, no doubt, decisions which would at first sight appear to favor the first of these contentions, but they are, I think, distinguishable from the case before us. In *Pickering v. Busk* <sup>(1)</sup> the purchaser of hemp lying at a wharf had himself directed the hemp to be transferred in the wharfinger's books into the name of the broker who had bought it for him. It was held that from this an authority to the broker to sell might be implied, though no such authority had in fact been given, and that his sale and receipt of the money, though fraudulent as to his principal, nevertheless bound the latter. "The sale," said Lord Ellenborough, "was made by a person who had all the indicia of

(1) 15 East, 38.

property; the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name." And Bayley, J., says: "It may be admitted that the plaintiff did not give the broker any authority to sell. But an implied authority may be given; and if a person puts goods into the custody of a vendor whose common business it is to sell, without limiting his authority, he thereby 38] confers an implied authority upon him to sell \*them." This language might appear to be applicable to the present case; but there is a material difference between the two cases. In *Pickering v. Busk* (1) the purchaser had himself expressly directed that the goods should be entered in the broker's name. In the present case the plaintiff has simply remained passive. He has left things as he found them at the time of his purchase.

The same observation will apply to the case of *Boyson v. Coles* (2), a case which arose prior to the passing of 6 Geo. 4, c. 94, and in which goods had been pledged by a person alleged to have been a factor, but in which the defence was that the plaintiffs had dealt with the broker as purchaser, or, at all events, by the documents which had passed between them had enabled him to appear as such to others, Lord Ellenborough left to the jury whether the plaintiffs had dealt with the parties pledging as purchasers of the goods, or as brokers, directing them that, "if as brokers, the latter had no right to pledge the goods to the defendant, unless the jury considered that the plaintiffs had armed them with such indicia of property as to enable them to deal with it to others as their own?" A new trial was applied for, but this ruling was not quarrelled with. On the argument on the rule, Abbott, J., approves of the questions left to the jury, one of them he says being "whether the plaintiffs had by their own acts enabled Coles Brothers (the brokers) to hold themselves out as the purchasers, and thus to induce the defendant to advance his money on the credit of the goods."

In *Dyer v. Pearson* (3), where a similar question arose, Abbott, C.J., told the jury "that if a man takes upon himself to purchase from another under circumstances which ought to have excited his suspicion, and induced him to distrust the authority of the person selling, such a purchaser could not hold the property if it afterwards turned out that

(1) 15 East, 38.

(2) 6 M. &amp; S. 14.

(3) 3 B. &amp; C. 38.

the person from whom he bought had no authority to sell ; and he left it to the jury to say, whether the defendant had purchased under circumstances which would have induced a reasonable, prudent, and cautious man to believe that Smith, of whom he purchased, had authority to sell. If they \*thought that he had purchased under such circum- [39 stances, they were to find for the plaintiff." This ruling was held to amount to misdirection, and a new trial was granted. "The question," says the Chief Justice, "which I left to the consideration of the jury does not appear to me to have embraced the whole case. The general rule of the law of England is that a man who has no authority to sell, cannot, by making a sale, transfer the property to another. There is one exception to that rule, viz., the case of sales in market overt. This was not a sale in market overt, and therefore does not fall within the exception. Now this being the rule of law, I ought either to have told the jury, that even if there was an unsuspecting purchase by the defendants, yet as Smith had no authority to sell, they should find their verdict for the plaintiffs ; or I should have left it to the jury to say, whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having not the possession only, but the property ; for if the real owner of goods suffers another to have possession of his property, and of those documents which are the indicia of property, then perhaps a sale by such a person would bind the true owner. That would be the most favorable way of putting the case for the defendants, and that question, if it arises upon the evidence, ought to have been submitted to the jury."

It is to be observed that the Chief Justice here states the proposition in anything but positive terms. No further mention of the case appears in the reports, and we are consequently not informed what became of it on the new trial, the rule for which was made absolute. Mr. Chitty, however, in his work on Contracts (10th ed., p. 355), referring to these cases, writes thus: "It is said that if the real owner of goods suffers another to have possession thereof, or of those documents which are the indicia of property therein, thereby enabling him to hold himself forth to the world as having not the possession only but the property, a sale by such a person without notice will bind the true owner." But he adds this qualification: "But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who from the nature of his employment might be taken *prima facie* to have had the

1877

Johnson v. Credit Lyonnais Co.

40] right to sell." The law, as thus \*stated, was approved by the Court of Exchequer in *Higgins v. Burton* <sup>(1)</sup>. But the present question was not before the court in the latter case, the question there being whether a person who had bought goods in the name of A., fraudulently representing himself as A.'s agent, and had thus obtained possession of the goods, could pledge them so as to give a title to the pledgee as against the real owner. And it was held, following *Kingsford v. Merry* <sup>(2)</sup>, that he could not.

Sitting here in a Court of Appeal, I feel myself at liberty to say that these authorities fail to satisfy me that at common law the leaving by a vendee goods bought, or the documents of title, in the hands of the vendor till it suited the convenience of the former to take possession of them, would, on a fraudulent sale or pledge by the party so possessed, divest the owner of his property, or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by statute to the unauthorized sale of goods by a factor.

The doctrine established in *Pickard v. Sears* <sup>(3)</sup> and *Free man v. Cooke* <sup>(4)</sup>, and the subsequent cases which have proceeded on the same principle, carry the case no further. In all the cases decided on this principle, in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him. Here it is clear that the plaintiff had no knowledge whatever of the advances obtained by Hoffmann on the security of the goods, or even of the existence of the dock warrants which made Hoffmann appear to be the owner. It would be to carry this doctrine much too far to apply it where advantage has been taken of a man's remissness in looking after his own interests to invade or encroach upon his rights, in the absence of knowledge on his part of the thing done, from which his assent to it could reasonably be implied.

The defence, founded on the allegation of negligence remains to be considered.

That the plaintiff, in omitting to have the goods transferred to \*his own name, and to have the dock warrants delivered over to him, was wanting in common prudence, in other words, was guilty of negligence, I cannot bring myself to doubt, and I am strongly confirmed in this view by the passing of the recent statute, as the Legislature

<sup>(1)</sup> 26 L. S. (Ex.), 342.

<sup>(3)</sup> 6 A. & E., 469.

<sup>(2)</sup> 11 Ex., 577.

<sup>(4)</sup> 2 Ex., 654; 18 L. J. (Ex.), 114.

must have proceeded on the view that there is default in the owner in such a case.

It appears to me no answer to say that he was ignorant of dock warrants being issued in respect of goods warehoused in the docks. A man who deals in a given market should make himself acquainted with the course of business prevailing there. Moreover, he knew that the tobacco was warehoused in the bonded warehouses of the company. He must have known that the goods would stand in the books of the company as the goods of Hoffmann. He should at least have taken care to have them transferred into his own name. It is no answer, as it seems to me, to say that it is common in the trade for buyers of tobacco to leave the goods and the indicia of title in the hands of the seller, and that hitherto no dishonest advantage has been taken of the opportunity thus afforded for fraud. The mercantile community are as a body honorable men; but experience unfortunately tells us that frauds occasionally happen where they might least be expected. The case of *Goodwin v. Roberts* (<sup>1</sup>), which was recently before the courts, affords an example, and other instances of a similar character occur in the books. In the majority of instances this occurs, as in this case, from the carelessness of those concerned, and the omission to take the precautionary measures which the regular course of business would prescribe. This manner of proceeding is not the less imprudent and negligent because a number of persons, confiding in the honesty of those with whom they have dealings, think proper, in order to save themselves trouble, to expose themselves to a like risk.

Evidence was gone into at the trial of what was called the "practice" in the tobacco trade of following the course pursued in the present instance by the plaintiff, namely, that of leaving, on the purchase of tobacco in bond, the tobacco and the dock warrants in the hands of the seller—whether, with the view of meeting the allegation of negligence, or as a substantive answer \*in point of law to the defendant's claim, as amounting to a usage of trade, it may be difficult to say. If the former, I have given the answer which occurs to me, namely, that that which would be negligence in one does not become the less so because others are equally negligent. If the latter, two answers present themselves. First, a practice, to amount to a usage of trade, must be general and uniform. But of this the evidence falls altogether short. The plaintiff's witnesses, called to prove the practice, while they asserted that the practice was com-

(<sup>1</sup>) Law Rep., 10 Ex., 337; 14 Eng. R., 591.

1877

Johnson v. Credit Lyonnais Co.

mon, fully admitted that there were many houses in the trade who, when they bought tobacco under similar circumstances, insisted on having the indicia of title made over to them. Nor did these witnesses for a moment deny that a purchaser was entitled to have such a demand complied with. This being so, any assertion of usage of trade necessarily fails.

But, besides this, a usage of trade, like any other custom, to be valid must be reasonable. But a usage cannot be said to be reasonable which enables a dishonest vendor, through the negligence of his vendee, to defraud a second purchaser, or a pledgee, by a pretended sale or pledge.

But whether this negligence of the plaintiff will under the circumstances give to the defendants any ground of complaint which can be enforced in point of law is a very different question. Negligence, to afford a ground of action to one who has suffered from it, must have reference to some duty which the party guilty of the negligence owed to him. The law is in my opinion, correctly stated by Blackburn, J., in *Swan v. North British Australian Company*(<sup>1</sup>) where, after referring to what was said by Parke, B., in *Freeman v. Cooke*(<sup>2</sup>), namely, that "negligence to have the effect of estopping the party must be the neglect of some duty cast upon the person guilty of it," he goes on to say: "This I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those [3] goods from the thief, except \*in market overt." The same principle would obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is applicable here. The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owed no duty to the defendants—at least no duty which the law can recognize—either as individuals or as members of the general public.

The case of *Young v. Grote*(<sup>3</sup>) is, as was pointed out in the case just referred to, plainly distinguishable. For, there, there was a duty on the part of the customer to use due care in drawing the check, so as to protect the banker

(<sup>1</sup>) 2 H. & C., 175, at p. 181; 32 L. J. (Ex.), 273, at p. 276.

(<sup>2</sup>) 2 Ex., 654; 18 L. J. (Ex.), 114.

(<sup>3</sup>) 4 Bing., 253.

against the risk of forgery in the amount for which the check was drawn.

This being so, I am of opinion that the negligence of the plaintiff neither estops him from claiming the goods in question from the defendants, nor gives the latter a counterclaim for the money which they have advanced to Hoffmann on the security of the goods.

I am therefore of opinion that the judgment of Mr. Justice Denman in the case of *Johnson v. Credit Lyonnais Company* (1) should be affirmed.

With regard to the judgment of Mr. Justice Field in *Johnson v. Blumenthal*, I feel bound to say that the question put to the jury, as I understand at the instance of counsel, and the answer given to it do not appear to me to be conclusive of the case or sufficient to found the judgment; and, if there were any material fact in dispute, I should think it necessary to send the case back to a new trial. But as, upon the admitted facts, the plaintiff is, for the reasons I have given, in my opinion, entitled to judgment, a new trial would be useless and unnecessary. In this action also, therefore, I think, that the appeal should be dismissed and the judgment affirmed.

BRAMWELL, L.J.: In these cases I agree in the judgment of my Lord Chief Justice, and my Brother Brett, but I propose to add some remarks of my own, for this reason: It has been laid down that the "intrusting" under the Factors Act must be "to a factor \*or agent as such;" [44] but the language of the statutes has not, as it seems to me, been critically examined to show that that is the meaning till Mr. Thesiger did so in these cases. The following observations are for the same purpose. On examination it will be found that the defence on those acts in these cases turns on s. 2 of 6 Geo. 4, c. 94. For 5 & 6 Vict. c. 39, s. 1, so far as these cases are concerned, only repeals the proviso in s. 2 of 6 Geo. 4, c. 94, as to the pledgee not having notice. But to understand this 2d section of 6 Geo. 4, c. 94, and show that it alone could apply to these cases, it is necessary to examine several of the clauses of the statutes called Factors Acts. The first section of the first of these acts, 4 Geo. 4, c. 83, enacts that any person intrusted for the purpose of sale with any goods and by whom they shall be shipped, or when shipped in his name by any other person, shall be deemed to be the true owner, so far as to entitle the consignee to a lien thereon for advances. It is manifest that this only applies to cases where the person in whose name the goods

(1) 2 C. P. D., 224; 20 Eng. R., 486.

1877

Johnson v. Credit Lyonnais Co.

are shipped, is intrusted with them for the purpose of sale : and it only applies to advances by consignees to the person in whose name goods are shipped. The 2d section says that any person may make advances on goods or bills of lading to consignees thereof, but only to the extent of the interest of the consignee. This section then would enable a consignee who had a lien for advances by the common law, or by the 1st section, to give a right to the same extent to another. But as far as the statute is concerned, it only confers a title to a consignee where goods are intrusted to a person for sale and shipped in his name.

The next act is the 6 Geo. 4, c. 94. By sect. 1, "any person intrusted for the purpose of consignment or of sale with goods which he has shipped in his own name, is to be deemed the true owner, with the same powers as in the former statute." Here also there must be an intrusting for sale or consignment. But the section contains a further provision with language different from the first act, "any person in whose name goods shall be shipped by any other person shall be deemed," &c. This does not say in words any person intrusted for sale or consignment, but it must mean so. Because it is impossible to suppose that there was to be a difference between a case where goods are shipped by A. in 45] his \*own name, and one where goods are shipped in A.'s name by B. It is also obvious that if taken literally stolen goods might be shipped in somebody's name by the thief, so as to give that person a right in respect of advances. But the matter is concluded by the last proviso in that section, which supposes that it only applies where goods are intrusted for the purposes of consignment or sale. The only difference then between this section and 4 Geo. 4, c. 83, is that the latter act includes the case of goods intrusted for consignment in addition to that of goods intrusted for sale. The 2d section of 6 Geo. 4, c. 94, is that on which this case depends, as far as the Factors Acts are concerned ; it has a more extensive operation than the previous provisions, which only apply to consignees under shipments ; but this section applies to all cases where persons are intrusted with, and in possession of, bills of lading, warrants, certificates, or orders for the delivery of goods, which suppose a right to the possession of goods. It does not mention "goods" themselves. It provides that it shall not apply, where by the document or otherwise, there is notice that the person intrusted is not the true owner of the goods. So that possession by A. of a bill of lading to the order of B., would not be within the section. It says that the person intrusted shall be deemed



the true owner of the goods, so as to give validity to contracts for sale or disposition or deposit or pledge thereof. It does not say "factor" or "agent" intrusted, but "person." What is the "intrusting," and who is the "person" within this section? Must the intrusting be to a "person" who is factor or agent, and to him to act as such factor or agent, or does it apply wherever possession of the document is given to another by the person entitled? Arguments can be found to show it does. I believe the documents specified in the statute always mention the name of the person entitled, so that if the true owner has indorsed the document, or allowed it to be made out in another's name, there is ground for saying that he is by his own act no longer the true or apparent owner of the goods, or has given the power or apparent power of disposing of these goods to the holder of the warrant. The following considerations, however, seem to me conclusive the other way. As I said before, "goods" are not mentioned. In the 3d section, however, \*goods only are, and not bills of lading and other documents. It does seem impossible to suppose it was meant that intrusting a clerk or other person with bare possession of a bill of lading should enable that person to dispose of the goods mentioned in it, and that intrusting with possession of a document of title would have greater effect than intrusting with goods. Further, by 6 Geo. 4, c. 94, s. 1, consignees can pledge bills of lading, but only where intrusted therewith for sale or consignment. It cannot be, then, that s. 2 means that any person intrusted with the possession merely can pledge them. Further, by s. 4 persons may buy goods of known agents intrusted therewith and pay them in the ordinary course of business, and without notice of want of authority. This would also seem to be the law independently of statute. But the "person" who can pledge must surely be a person of the same character as the one who can sell, viz., an agent. Section 5 says that it shall be lawful to accept and take goods, or "any such document as aforesaid," in deposit or pledge from any such factor or agent, though known to be such, but so as to get no greater right than could have been enforced by such factor or agent. In this section "factor" is mentioned for the first time; "agent" occurred in the preceding section. It goes further than s. 2 of the former act, in the following particulars: it is not limited to consignment and bills of lading, nor to cases where there is no notice that the pledgor is an agent. What is the meaning of "such factor" or "agent," factor not being previously named?

1877

Johnson v. Credit Lyonnais Co.

Section 2 of 4 Geo. 4, c. 83, is unrepealed. It cannot be that the consignee must be intrusted for sale, but the factor need not be. It seems to follow, then, that such factor or agent as is mentioned in s. 5 of 6 Geo. 4, c. 94, is the factor or agent intrusted for consignment or sale. This is confirmed of s. 6, which says that the true owner may recover his goods from his factor or agent before the same are sold or pledged. This supposes that "person intrusted" in s. 2 means as factor or agent and agent in the nature of factor. Again, s. 7 recites it is expedient to prevent the improper deposit or pledge of goods intrusted or consigned as aforesaid to factors or agents, and then enacts that if any such factor or agent shall deposit or pledge any goods intrusted 47] or consigned as aforesaid to \*his care or management, or any of the documents so possessed or intrusted as aforesaid in violation of good faith, he shall be guilty of a misdemeanor; and in the next sections "principals" are spoken of. Further, the preamble of 5 & 6 Vict. c. 39, supposes that the intrusting is to an agent, and that pledges are only to be valid where sales would be; and it enacts, any agent who shall be intrusted with the possession of goods or of documents of title to goods shall be deemed to be the owner so far as to give validity to pledges, &c., *bona fide* made; though the pledgees had notice that the pledgor was only an agent. This, in effect, repeals the qualification in the former act as to notice, and shows conclusively that the "intrusting" in 6 Geo. 4, c. 94, s. 2, must be to a person who is an agent, and necessarily therefore an intrusting to him as such, because, and it is absurd to suppose that the intrusting must be to a factor or agent, but need not be to him as such. The consequences would be that a sugar warrant left for safe custody with a tobacco broker might be pledged by him, though he could not sell it. In the result it seems to me that the combined effect of the first two statutes is by s. 1 of 4 Geo. 4, c. 83, and s. 1 of 6 Geo. 4, c. 94, persons in whose names goods are shipped who are intrusted therewith for sale or consignment shall be deemed to be the true owners, so as to entitle consignees without notice to a lien for advances.

By the second sections of both acts the consignees of goods may pledge them or the bills of lading thereof, and factors or agents in the nature of factors intrusted with bills of lading and warrants to deal with them as factors may make valid contracts of sale or pledge as to them to persons not having notice; when there is notice then the contract of sale is only valid to the extent of the pledgor's

interest. Unless "person intrusted," in s. 2 of 6 Geo. 4, c. 94, means factor or agent intrusted as such, that section will differ in that particular from all the others of all three statutes. It will appear from this that Lord Tenterden, as quoted in Law Rep., 10 C. P., 361, is not quite accurate. He says "the person in whose name the goods are shipped is to be deemed the true owner thereof." He should have added, "where intrusted therewith for sale or consignment." There are other provisions in these acts not necessary to be mentioned further. The cases before us turn on \*their [48 provisions, and not on those of 5 & 6 Vict. c. 39, which is only important in these cases as showing the meaning of the former acts. Section 6 may be referred to. It makes it a misdemeanor for an agent "intrusted as aforesaid," for his own benefit and in violation of good faith to make any deposit, &c., of such goods or documents "contrary to or without such authority." In the present case there was no intrusting to Hoffmann as an agent, nor indeed at all. I have not forgotten that by s. 4 of 5 & 6 Vict. c. 39, an agent intrusted as aforesaid and possessed of such documents of title, obtained by reason of such agent having been intrusted with the possession of goods, shall be deemed to be intrusted with the possession of the goods, and that he shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody or be held by another subject to his control. But in those cases there is an intrusting as agent. Here there was nothing of the sort. The plaintiff, the vendee from Hoffmann, left the goods in the control of Hoffmann because they stood in Hoffmann's name. But he left them there, not that Hoffmann should deal with them as his or as a factor or agent, but that he might forward them to him or his order, in pursuance of the practice that existed in dealings between them, and which therefore was part of the contract between them of vendor and purchaser. The case might be treated thus: Suppose Hoffmann was indicted under s. 7 of 6 Geo. 4, c. 94, would it be possible to make out that he was "such factor or agent" as there mentioned? I am of opinion, therefore, that these cases are not within the Factors Acts; that the question turns on s. 2 of 6 Geo. 4, c. 94; that the "person intrusted" there means "factor or agent intrusted as such;" but Hoffmann was not intrusted by the plaintiff as his factor or agent. The 40 & 41 Vict. c. 39 is not retrospective, otherwise the case would be within s. 3 of that statute if the continued possession of goods by a vendor is within it. One

1877

Johnson v. Credit Lyonnais Co.

may observe that it shows what words would, and consequently what do not, include the present case.

I need say nothing on the other point except that I agree with the Lord Chief Justice and my Brother Brett.

BRETT, L.J.: The first of these cases was tried before 49] Denman, J., \*without a jury, the second before Field, J., and a special jury. In the second case the only question proposed on behalf of the defendant for the consideration of the jury, and the only question left to them was, "Whether the plaintiff did give to Hoffmann authority or ostensible authority to deal with the goods as owner, or as agent with authority to pledge?" The jury answered, "Certainly not." It was admitted that Hoffmann was originally the owner of the tobacco; that he had sold it to the plaintiff so as to pass the property in it to the plaintiff; that the tobacco was only left in bond in Hoffmann's name, in order to avoid payment by the plaintiff of duty until the tobacco should be forwarded to him by Hoffmann on request as the plaintiff might require it. It was admitted that this was an ordinary practice in the tobacco import trade. It was expressly admitted that there was no negligence on the part of the plaintiff in leaving the goods in bond and in Hoffmann's name. It was admitted on behalf of the plaintiff that Hoffmann, besides being an importer and seller of tobacco on his own account, did carry on the business of a tobacco broker or factor. Upon this last admission it was submitted to the learned judge that, notwithstanding the finding of the jury, the defendant was entitled to judgment. The proposition submitted was, that the defendant was entitled to judgment, because the goods were intentionally left by the plaintiff in the apparent possession and control of a man whose business, or a branch of whose business, it was to sell that sort of goods. Whether this was alleged to be by virtue of the Factors Acts, or as conclusive evidence in favor of the defendant of the proposition which was submitted to the jury is not clear. In either view the learned judge gave judgment for the plaintiff.

In the first case, Denman, J., determined the same question of law in the same way, and found on the questions of fact that the plaintiff only left the possession and control of the documents representing the tobacco in the power of Hoffmann, as his agent for the purpose of forwarding the tobacco to him or to his order; that Hoffmann was a mere vendor to the plaintiff, who was, in accordance with the practice of the trade, left in possession of the goods in bond so as to avoid premature payment of duty, undertaking to

clear and forward the goods for the plaintiff as required ; \*that under such circumstances Hoffmann was not in [50 law or in fact intrusted by the plaintiff as an agent *quâ* sale or pledge or dealing of any kind of or in the goods.

The learned judge held, as matter of law, upon such findings of facts, that neither the 9th or 10th paragraphs (') of the defendants' statement of defence was proved.

There was no allegation, it will be observed, in either of those paragraphs or in any other part of the statement of defence that the plaintiff had been guilty of negligence.

It seems to me that the evidence in the two cases was substantially to the same effect, and that the findings of fact and rulings of law are substantially the same.

It follows that the questions are :

(1.) Can the findings of fact, which in neither case include a finding of negligence on the part of the plaintiff, be set aside as unsatisfactory ;

(2.) If not, are the transactions of the defendants respectively protected by the Factors Acts ;

(3.) Or, in consequence of the plaintiff's conduct, though he was not guilty of negligence ;

(4.) Or was there evidence of negligence on the part of the plaintiff so strong as to oblige the court to send the second case to a new trial on the same or other pleadings, and to enter judgment for the defendants in the first case as upon a rehearing ?

Omitting for the present the question of negligence on the part of the plaintiff, I think that the answer of the jury in the second case, and the findings of fact by the learned judge in the first case, cannot be set aside by us. It follows that Hoffmann was not intrusted by the plaintiff with the possession either of the goods or of the documents of title as an agent for sale or pledge, or in order to carry out any part of a contract of sale or pledge ; but, if intrusted as an agent at all, only at the utmost as an agent to hold the goods in custody, and the documents for the purpose of clearing the goods and forwarding them to the plaintiff or his order, on request. Under such a state of facts, I am of opinion that the cases of *Fuentes v. Montis* ('), and *Cole v. North Western Bank* ('), \*are conclusive authorities [51 on the construction of the Factors Acts, and that the transactions of the defendants are not protected by the Factors

(1) See 2 C. P. D., at p. 227 ; 20 Eng. Rep., 489.

(2) Law Rep., 9 C. P., 470 ; 10 Eng. Rep., 249 ; Law Rep., 10 C. P., 354 ; 12

(3) Law Rep., 3 C. P., 268 ; Law Rep., 4 C. P., 93.

Eng. Rep., 418.

Acts. If the plaintiff was guilty of no negligence and did not give either authority or ostensible authority to Hoffmann to pledge the tobacco, the defendants cannot, I think, be protected by any principle of law independent of the statutes. There is nothing done by the plaintiff to estop him from maintaining against the defendants his rights of ownership.

The only question remaining is that as to the alleged negligence of the plaintiff, and the consequences of such negligence if it should exist. The negligence suggested is the omission to have the tobacco transferred into his own name at the dock bonded warehouse, or to have the dock warrants or delivery orders transferred to him by Hoffmann. But in the face of the finding of a mercantile jury in one of the present cases, and the admission in both that what the plaintiff did was what so many mercantile men have, up to this time habitually done, that to do otherwise was an exception, I feel that we ought not to hold that in the present cases the plaintiff was guilty of negligence, and therefore that we have not to consider what the consequences of such negligence might be. I am of opinion that both judgments should be affirmed with costs.

*Judgments affirmed* (1).

Solicitors for plaintiff: *Chester, Urquhart, Mayhew & Holden*, for Barley & Read, Bolton.

Solicitors for Credit Lyonnais Company: *Michael Abrahams & Roffey*.

Solicitors for Blumenthal: *Munton & Morris*.

(1) See now 40 & 41 Vict., c. 39.

See 28 Eng. Rep., 839 note.

Where one by his own act has armed another with power to act for him, and this agent or attorney deals with innocent third parties who, without notice or other intervening equity, advance money upon the faith of the evidences of title in the possession of the agent or attorney, the owner takes every risk, and is bound by the act of the person whom he thus sees fit to hold out to the world as his agent or attorney: *Burton's Appeal*, 93 Penn. St. R., 214.

Where the rightful owner of corporation stock invests another person with the usual evidence of title thereto, or an apparent authority to dispose of the stock, he is estopped from making any claim thereto against an innocent pur-

chaser dealing on the faith of such apparent ownership or right of disposal: *Walker v. Detroit*, etc., 11 N. Western Reporter, 187, 190 and numerous cases cited, Sup. Court, Mich.; *Burton v. Peterson*, 12 Phila., 397; *Clarke v. Roberts*, 25 Hun, 86.

A *bona fide* purchaser of a certificate of stock with blank power of attorney, from a confidential agent of the owner, in whose custody it has been deposited, and whose sale thereof is fraudulent, is entitled to hold the same as against the real owner or his representatives: *Dovey's Appeal*, 97 Penn. St. Rep., 153.

Where an owner of stock leaves his certificates with a broker, accompanied with a blank power of attorney to sell

and transfer the same, and the broker pledges them for his own debt to one without any knowledge of the fraud of the broker, the owner of the stock is estopped from setting up his ownership against such innocent pledgee who has advanced money thereon: *Burton's Appeal*, 93 Penn. St. R., 214.

A. borrowed \$300 of B., and, as collateral security, transferred and delivered to him a note and mortgage for \$1,500. The assignment of the mortgage was absolute in form, and recited the consideration to be \$300. B. transferred the note before it came due, and assigned the mortgage to C. as security for the loan of \$1,200. Held, on a bill in equity brought by A. against B. and C. to redeem the note and mortgage, that the recital of the consideration in the assignment of the mortgage to B. was not alone sufficient to put C. on inquiry, or to prove fraud on his part; and that A. could redeem only on payment of the amount for which C. held the note and mortgage as collateral security: *Briggs v. Rice*, 130 Mass., 50.

On May 31, 1877, the board of town officers, under the authority conferred by chapter 193 of 1877, directed the supervisor of the town of White Plains to raise the amount of taxes remaining unpaid as shown by the return of the collector, less the amount then in his hands, applicable to the payment of such taxes upon certificates of indebtedness. The unpaid tax then amounted to \$6,526.88. In the latter part of May, 1877, the plaintiff received, directly from the supervisor, a certificate for \$500, issued in due form, and made payable to the supervisor or order. In an action brought by him to recover the amount due upon the said certificate, it appeared that at the time it was issued the supervisor had already issued certificates to the amount of \$6,000, and had paid to the county treasurer the whole amount returned for unpaid taxes with the proceeds of such certificates, and other moneys in his hands applicable to that purpose: Held, that although the resolution might be sufficient to put the plaintiff on inquiry as to the authority of the supervisor, yet as he was himself the proper person of whom to make inquiry, the town was, as against

the plaintiff, who was a *bona fide* holder of the certificate, estopped from setting up the lack of authority in its agent to issue it, upon the principle that where a power is conferred, if the agent does an act which is apparently within the terms of the power, the principal is bound by the representations of the agent as to the existence of any extrinsic facts essential to the proper exercise of the power, where such facts rest peculiarly within the knowledge of the agent: *Gifford v. White Plains*, 25 Hun, 606.

See *Clay Co. v. Society for Savings*, 3 Morr. Tr., 654; *McCall v. Town of Hancock*, 10 Fed. Reporter, 8.

S. brought suit against N. and others to obtain a sale of land to satisfy a judgment lien thereon. To this suit H. was made a party defendant, who, upon receipt of summons, gave to C., his regular attorney, certain notes indorsed by him in blank, together with a mortgage upon the land to secure the same, for collection.

C. caused a cross petition to be filed on behalf of H. setting up his mortgage lien. The court upon trial ordered the land to be sold to satisfy the liens of S. and H. Pending the suit, H. agreed with N. to extend the note for a year from the time when it fell due. Before the time so extended had expired, N., fearing that the land would be sacrificed, employed a broker who applied to C. to find a purchaser at private sale. C. went to J. S. and offered him the land for \$3,500, telling him of the mortgage, and saying that he had in his possession all the papers necessary to make a clear title. J. S. paid him the money and directed him to pay off all the claims upon the land, including the mortgage of H., and obtain H.'s cancellation of the mortgage, upon his return, he being then absent. C. paid the costs and the claim of S., but embezzled the remainder of the money.

Held, that under this state of facts C. acted as the agent of J. S. to make payment to H., and not as the agent of H. to receive payment from J. S., and that as between the two innocent parties the loss must be borne by J. S.: *Volte v. Hulbert*, 2 Ohio L. J., 339, Sup. Ct., Ohio.

It is an established rule, that the as

1877

Brookes v. Drysdale.

signee of a mortgage takes it subject to all the equities which the mortgagor may claim against it, but free from secret equities existing in favor of third persons.

A mortgagor may, by concealing his equities, or misleading the assignee, place himself in a position where justice will be defeated if he is allowed to set up, against the assignee, an equity on which he would be entitled to prevail in a suit by his mortgagee. Where the conduct of a mortgagor leads to such

a result, courts of equity hold that he is estopped.

Where one person, by either words or conduct, induces another to believe that he may safely purchase certain property, or take a certain security, and by subsequently relying on such representation, acquires the property or security, the former will never be permitted, in a court of equity, to overthrow the title so acquired: *Woodruff v. Morristown Institution for Savings*, 34 N. J. Eq., 174

[3 Common Pleas Division, 52.]

Dec. 3, 1877.

52]

\*BROOKES V. DRYSDALE.

*Construction of Agreement—Covenant or Stipulation—Public house Lease*

By a contract for the sale of a public house, the vendor agreed to assign and the purchaser agreed to take the lease, "subject to the yearly rent of £90 and the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public houses." Upon investigating the title, the purchaser found that the lease under which the premises were held contained this clause: "Provided always and these presents are upon this express condition, that all and every underlease, deed of assignment, &c., which shall be made and executed during the term, shall be left with the solicitor of the ground-landlord within two months of its date, for the purpose of registration, and a fee of one guinea paid for such registration," and a power of re-entry in case of "breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to."

The purchaser refused to complete, on the ground that this was not a common and usual covenant; and the jury so found:

*Held*, that, whether the proviso in the head lease was a "covenant" in the strict sense or not, it was at all events a covenant within the contemplation of the agreement, and therefore the purchaser was not bound to complete.

THE plaintiff became the purchaser of a public house under the following agreement:

An agreement made and entered into this 13th day of June, 1876, between A. J. Drysdale, of, &c., hereinafter called the vendor, of the one part, and H. J. Brookes, of, &c., hereinafter called the purchaser, of the other part:

The said vendor, for and in consideration of £200 to him now paid by the purchaser by way of deposit, and of the further sum of £4,500 to be paid to the vendor at the time hereinafter mentioned, doth hereby, for himself, his heirs, &c., agree with the purchaser, his executors, &c., to furnish and adduce a proper title, subject as hereinafter mentioned, and well and effectually to assign to him or them, or to such person or persons as he or they may appoint, a lease of all that public house and premises known by the sign of the



Grafton Arms, situate in Grafton Street, Mile End, &c., for the remainder of a term now to come and unexpired therein, which is seventy-three years at least from Midsummer, 1876, subject to the yearly rent of £90 and the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public houses, and to deliver up quiet possession of the aforesaid house and premises (except that part which is underlet) to the purchaser, his executors, &c., or to such person or persons as he or they may appoint, on or before the 3d of July, 1876, and to clear up all rents, taxes, gas-light rent, and all incumbrances whatsoever up to the time of taking possession; also to make a good and proper assignment of the licenses at the time above mentioned or as soon thereafter as may be, on being paid for the time unexpired therein, and for that purpose to attend at the transfer and do all acts necessary for vesting the same in the purchaser, his executors, &c., or such person or persons as he or they \*may ap- [53 point: And the purchaser, for himself, his executors, &c., doth hereby agree with the vendor to accept such assignment of the lease aforesaid without requiring the production of the lessor's title, or any evidence of title prior to the lease under which the present vendor holds the premises, notwithstanding any superior or other title or evidence of title may be recited, stated or referred to or covenanted to be produced, and shall make no objection should the lease be an underlease or the premises demised form part of larger property demised by any superior or other lease, or that the premises may be subject to any superior rent; and shall enter upon and take possession of the premises on the 3d of July next, and thereupon pay to the vendor £4,500, being the remainder of the purchase-money for the said lease and good-will; also to purchase at a fair appraisement the furniture, stock, &c. And it is hereby further agreed that, if either party shall refuse or neglect to perform his part of this agreement, he shall pay to the other £500 as ascertained damages; and, in case of default on the part of the purchaser, the deposit money shall be forfeited in part of such damages. In witness, &c.

The abstract was delivered on the 20th of June; and, on the plaintiff's solicitors comparing the lease with the abstract, they discovered that the lease contained the following stipulation or condition:

Provided always and these presents are upon this express condition, that all and every underlease or underleases, deed

1877

Brookes v. Drysdale.

and deeds of assignments or disposition of the premises whatsoever, and evidence of all devolutions of the same by will or act of law, which shall at any time or times during the said term hereby granted be made or executed or occur, shall be left with the solicitor for the time being of the superior or ground-landlord or landlords for the time being within two calendar months from the date of such assignment, underlease, or deed of disposition or devolution as aforesaid, for the purpose of registration by him, and a fee of one guinea paid to him for such registration: Provided, also, and these presents are upon this condition, that, if the said yearly rent hereby reserved shall be unpaid by the space of twenty-one days after any of the days hereinbefore appointed for the payment thereof, or in case of breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to, and by the said lessee, his executors, administrators, or assigns to be observed and performed, then it shall be lawful to and for the said lessor at any time thereafter upon the said demised premises to re-enter and the same to have again and retain as in his and their former estate.

The plaintiff thereupon declined to complete the purchase, on the ground that this was not a "common and usual covenant," and brought this action to recover back the deposit.

At the trial before Field, J., at the last Easter Sittings, it was contended on behalf of the defendant that the proviso in question was not a *covenant*, but merely a stipulation or condition; and that it was a common and usual stipulation in leases of public houses.

54] \*The learned judge ruled that it was a covenant, and the jury found that it was not a common and usual one, and returned a verdict for the plaintiff for £200, to be reduced to £100 upon delivery up of the L. O. U. which had been given for a moiety of the deposit.

A rule *nisi* having been obtained for a new trial on the ground of misdirection.

*Grant v. A.G.*, Q.C., and *C. H. Roberts*, showed cause: In Sheppard's Touchstone, p. 162, it is said: "There needs not formal and orderly words, as, covenant, promise, and the like, to make a covenant on which to ground an action of covenant, for, a covenant may be had by any other words; and upon any part of an agreement in writing, in what words soever it be set down for anything to be or not to be done, the party to or with whom the promise or agreement

is made may have this action upon the breach of the agreement. And therefore, if these words be inserted in a deed, amongst other covenants, 'that the lessee shall repair, provided always that the lessor shall allow timber,' or 'that the lessee shall scour ditches, provided always that the lessor do carry away the earth,' these are good covenants on both sides." In Com. Dig., Covenant (A 2), it is said: "Any words in a deed which shew an agreement to do a thing make a covenant: as, if it be agreed by articles between A. and B. that stock shall be in the hands of B. until a jointure be made, B. *solvendo proinde* the interest to A., covenant lies against B. for the interest:" Rol. Abr., 518, l. 50. So, in Com. Dig., Covenant (A 2), it is said: "If the words are introduced by words of condition, as, if a lease be upon condition that the lessee shall keep and leave the house in as good plight, &c. (1); or with proviso that, if the lessee dies within forty years, his executor shall have it for so many years, this is a covenant by the lessor that the executor shall have it:" Rol. Abr., 518, l. 45. *Treloar v. Biggs* (2) shows that a proviso or stipulation may be construed as a covenant if the nature of the case requires it. In *Hayne v. Cummings* (3) it was held that the words "covenant" and "condition," whenever used in an *agreement*, do not necessarily \*mean a covenant under seal or a con- [55 dition in the strict legal sense of the word; but may, in order to effectuate the intention of the parties, be construed to mean "contract" or "stipulation." Willes, J., refers to the several definitions of "covenant" given in Richardson, in Johnson, and in Webster; and at p. 427 he says: "To say that the word *covenants* here cannot apply to the stipulation contained in this agreement is to say that the word cannot have any sense at all. But we are bound so to construe the instrument as to give, if possible, effect to every word contained in it. Neither does the word *condition* necessarily apply to a condition under seal." Referring to the expressions of Lord Hobart, in *Earl of Clanrickard's Case* (4), Byles, J., at p. 428, says: "We are to be astute, if necessary, to put such a construction upon the words 'covenants' and 'conditions' as will best give effect to and carry out the intention of the parties to this agreement." There may, no doubt, be provisos or stipulations which are not covenants; for instance, a proviso for re-entry. Here, the word "covenant," to give it any sensible meaning at all, must be construed in its widest and most comprehensive

(1) Year Book, 40 Edw., 8, fo. 5 b.

(2) 16 C. B. (N.S.), 421.

(3) Law Rep., 9 Ex., 151; 9 Eng. R., 464.

(4) Hob., 277.

sense. The words of the clause are clearly words of obligation: the true meaning is, that there shall be nothing in the lease which binds the purchaser to anything which is unusual in such leases.

*A. L. Smith*, in support of the rule: This is not a covenant. In *Geery v. Reason* <sup>(1)</sup>, it was held that the words "provided and it is agreed," &c., make not a *covenant*, but only a condition so as to work a forfeiture if the thing agreed to be done is not done. *Suffield v. Baskerville* <sup>(2)</sup> is to the same effect. In a note in *Bac. Abr.*, *Covenant* (A), vol. ii, p. 340, it is said: "A proviso shall be sometimes taken for a *condition*, and sometimes for *explanation*, and sometimes for a *covenant*, and sometimes for an *exception*, and sometimes for a *reservation*. It is taken for a *condition*, as, if a man lease land, *provided* that the lessee shall not alien without the assent of the lessor, *sub pœna foris facturæ*; here it is a *condition*. If I have two manors both of them called Dale, and I lease to you my manor of Dale, *provided* that you shall have my manor of Dale in the occupation of J. S.; 56] here the proviso is an *explanation* \*what manor you shall have. If a man lease a house, and the lessee covenant that he will maintain it, *provided* always that the lessor is contented to find great timber; here it is a *covenant*. If I lease to you my messuage in Dale, *provided* that I will have a chamber myself; here it is an *exception* of the chamber. And, if I make a lease rendering rent at such feasts as J. S. shall name, *provided* that the feast of St. Michael shall be one; here this proviso is taken for a *reservation*.—per Popham, C.J., in *Earl of Pembroke v. Barkley* <sup>(3)</sup>. It may sometimes operate as a qualification of the covenant of the other party; as, if a lessee covenant to repair, *provided always that the lessor shall find great timber*, omitting the word *agreed*; this proviso shall not be any covenant on the part of the lessor, but shall be merely a qualification of the lessee's covenant: *Rol. Abr.*, *Covenant* (C), pl. 3, *Holder v. Taylor*. The very clause, too, of the proviso itself may operate both as a condition and as a covenant; as a condition, by force of the proviso; as a covenant by force of the other words: purporting a condition, as it contains the words of the grantor (for, no condition can be reserved or made but on the part of the donor, lessor, or feoffor,—*Dyer*, 6); purporting a covenant, as comprehending the words of the grantee. Nor is it material in what part of the deed the word *proviso* stands; it is the sense and not the place which is to determine its import. If it be substantive and

<sup>(1)</sup> Cro. Car., 128.

<sup>(2)</sup> 2 Mod., 36.

<sup>(3)</sup> Gouldsb., 131; Cro. Eliz., 384.

independent, and relate only to the estate passed, it is a condition; if it be qualified, it may amount to a covenant only: if there be a proviso and covenant in the deed, it may enure to both: *Jenk.*, 252; *Cromwel's Case* (1); *Simpson v. Titterell* (2); *Earl of Pembroke v. Berkley* (3); *Co. Litt.*, 203 b; 146." This proviso lies between the lessor's covenants and those of the lessee; and in the subsequent part it is referred to as a "stipulation." The only words which can be suggested to be otherwise than common and usual in leases of public houses, are the words which relate to devolutions "by act of law." This is a stipulation by the vendor, not that he will do anything to the purchaser, but to a third person. Assuming the lease to have been executed, could the lessor have sued the lessee for damages for not leaving the indenture of assignment or other evidence [57 of devolution of title with the solicitor of the ground-landlord for registration? Clearly not. The words of the agreement are distinct and unequivocal. The decision in *Hayne v. Cummings* (4) proceeded on the ground that upon any other construction there was nothing to which the word "covenant" in the agreement could apply.

GROVE, J.: I am of opinion that this rule should be discharged. Two questions arise in this case,—first, whether the stipulation in the head lease that every underlease or deed of assignment of the premises, and evidence of all devolutions of the same by will or act of law, which shall during the term be made or occur, shall be left with the solicitor of the ground-landlord for registration, amounts to a covenant, or is merely a stipulation in the nature of a proviso for re-entry, so as to make a breach thereof work a forfeiture,—secondly, whether the word "covenant" in the contract of sale in this case is to be tied down strictly to what was a covenant by the old law, or whether it was not intended by the parties to mean and include any stipulation or condition which might affect the lessee, of a nature and character which is other than is common and usual in public house leases. Upon both points my judgment is in favor of the plaintiff.

Upon the first point, I am of opinion, upon the authorities cited, and upon the reason of the thing, that, though the words "covenant" and "agree" are not used, there is enough to make this proviso or stipulation a covenant in law. "Any words in a deed which show an agreement to do a thing make a covenant: as, if it be agreed by articles be-

(1) 2 Rep., 71.

(2) *Cro. Eliz.*, 242.(3) *Cro. Eliz.*, 384; *Gouldsb.*, 130.

(4) 16 C. B. (N.S.), 421

1877

Brookes v. Drysdale.

tween A. and B. that stock shall be in the hands of B. until a jointure be made, B. *solvendo proinde* the interest to A., covenant lies against B. for the interest:" Com. Dig., Covenant (A 1). Again, "If the words are introduced by words of condition, as, if a lease be upon condition that the lessee shall keep and leave the house in as good plight, &c.; or with proviso that, if the lessee dies within forty years, his executor shall have it for so many years, this is a covenant by the lessor that the executor shall have it:" Com. Dig., 58] Covenant (A 2). \*The cases of *Geery v. Reason* (1) and *Suffield v. Baskerville* (2), cited by Mr. Smith, look rather the other way: but there the court considered that, taking the whole deed, the words were inserted, not by way of covenant, but merely as a condition or stipulation so as to work a forfeiture if not complied with. So, in Sheppard's Touchstone, p. 162, it is laid down that "there needs not formal and orderly words, as, covenant, promise, and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words:" and the following instance is put: "If these words be inserted in a deed, amongst other covenants, 'that the lessee shall repair, provided always that the lessor shall allow timber,' or 'that the lessee shall scour ditches, provided always that the lessor do carry away the earth,' these are good covenants on both sides." There, neither the word "covenant" nor the word "agreed" is used. It seems to me that, although there may be some slight apparent contradiction in some of the authorities, these may well be reconciled by looking at the whole of the instrument in order to ascertain the real intention of the parties. Looking at the words of the clause in question,—which are much the same as in the passage cited from Sheppard's Touchstone,—I do not see why it should not be held to be a covenant as much as the stipulations which precede it. It uses imperative words. Some reliance was placed upon the language of the proviso for re-entry in the lease,—“in case of breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to,” it shall be lawful for the lessor to re-enter; and it was said that if the proviso as to registration of deeds of assignment was not construed to be a “stipulation,” there was nothing to which those words could apply. If the language had been conjunctive instead of disjunctive, there might have been more plausibility in that argument. But I take it that the real meaning of the proviso is, that, in case of breach of any of the engagements entered into by the

(1) Cro. Car., 128.

(2) 2 Mod., 36.

lessee, the lease shall be forfeited, and the lessor may re-enter. General words like these do not affect the question what shall be a covenant and what a mere stipulation. I am of opinion that, consistently with all the authorities, the words in question are \*sufficient to create a covenant. [59 But, assuming that I came to the conclusion that this was not a covenant upon which an action of covenant could have been maintained, it does not follow that the words used in this agreement are not sufficient to show that the parties contemplated its being binding on them as a covenant. The purchaser agrees to take the remainder of the lease, "subject to the yearly rent of £90 and to the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public houses." What was the manifest intention of the parties to the contract? Was it not that the purchaser should make himself subject to all the obligations to which the vendor himself was subject, provided that they were such as were common and usual in public house leases? I think the word "covenant" in this agreement was not used in its strict sense: and, the jury having found that this was not a covenant that is common and usual in such leases, I think the plaintiff is entitled to retain his verdict.

LINDLEY, J.: I am of the same opinion. The question for us is, what is the true construction of this agreement. It is in print, and it is divided into two parts,—in the first part, the vendor agrees to sell and assign, and in the second part the purchaser agrees to accept an assignment of the lease. The clause which we have to construe is found in the first part. Now, the rule is, that, in construing a written instrument, you are bound to give it the interpretation which is the least favorable for the party whose language it is. But I do not think we are driven to that here. The vendor agrees to assign the lease "subject to the yearly rent of £90 and the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public houses." What is the object of that? It is to inform the buyer what are the conditions and obligations which he binds himself to enter into: the parties are not discussing how to classify them. The buyer is to have the lease subject to the payment of the stipulated rent, and he is to take upon himself the performance of all such covenants as are usual and common in leases of public houses. In what sense is the word "covenant" here used? The real meaning is that it shall include all \*the bur- [60  
thens the purchaser is about to undertake, whether in the

1877

Yglesias v. River Plate Bank.

form of a condition, a proviso, or a stipulation. If so, the case set up by the defendant is answered. The jury have found that the proviso in question is not a covenant which is common and usual in leases of this kind. If it were necessary to go into the question, I am disposed to think that the proviso or stipulation in question might well be construed to be a covenant. But I prefer to rest my judgment on the ground that it is clearly a covenant within the meaning of the parties to this agreement.

*Rule discharged, with costs.*

Solicitors for plaintiffs: *Martineau & Reid.*

Solicitors for defendant: *Shum, Crossman & Crossman.*

See 23 Eng. Rep., 713 note; 27 id., 207 note; Id., 268 note.

Where the mode of occupation is fixed by a lease, or where the purpose of a lease is expressed therein, or where the intention of the parties to confine the leased premises to a special use may be fairly implied from the words of the lease, the tenant may be enjoined from converting the property to other purposes; but without such express language, or such reasonable implication, there is no such restriction upon the tenant.

A written agreement between A. and B. recited that A. had leased to B. "the following real estate, to wit," followed by a description of five acres of land by metes and bounds, concluding, "containing a certain steam saw-mill, dwelling house," etc., with the privilege of using all the timber on the premises, but with the restriction that

all the valuable timber be used only for mill purposes, or in the improvement of the premises: Held, that such lease did not restrict the lessee to the use of the land for the purposes of the mill only: *Reed v. Lewis*, 74 Ind., 433.

Where a landlord leases premises to a tenant for the carrying on of a certain business, and covenants that he will not, during the term of the lease, lease other adjacent premises to other parties for the carrying on of a similar business, a breach of the covenant by the landlord is not a forfeiture of the right to the rent.

The tenant injured by such breach of covenant is not entitled to set off his damages in replevin upon a distress for rent levied by the landlord, but may have a reduction of the amount of the rent proportioned over the whole period of the lease: *Allegaert v. Smart*, 11 Week. Notes Cas., 171, Sup. Ct., Penn.

[3 Common Pleas Division, 46.]

Dec. 17, 1877.

### YGLESIAS V. MERCANTILE BANK OF THE RIVER PLATE (¹).

*Bill of Exchange—Effect of Cancellation, as between Payee and Acceptor, without full payment.*

The plaintiff obtained from the defendants an advance of £15,000 upon the security of goods then in transit to Monte Video consigned to one S., and of six bills of exchange drawn by the plaintiff upon and accepted by S. against the shipments. Two of these bills were duly paid; but, other two having been dishonored, the defendants (at Monte Video) proposed to realize the goods at once, whereupon the plaintiff handed them a check for £2,500, accompanied by a letter requesting them not to sell, and authorizing them to hold the £2,500 as collateral security for S.'s acceptances, to be returned to the plaintiff when all the bills should have been paid. The remaining bills having also been dishonored by S., the defendants took pro-

(¹) Affirmed, *post*, p. 198.



ceedings against him at Monte Video, which resulted in a judicial arrangement under which the goods were sold, and the bills were delivered up to S. cancelled without the knowledge or consent of the plaintiff. The sale of the goods did not produce sufficient, even with the £2,500, to pay all the bills.

In an action by the plaintiff against the defendants to recover back the £2,500:

*Held*, that, notwithstanding the effect of the cancellation of the bills was to discharge both the plaintiff and S. from all liability *on the bills*, and also to deprive the plaintiff, as drawer, of all remedy upon them against S. as acceptor, the circumstances under which such cancellation took place was not equivalent to payment of the bills in full; and, consequently, that the plaintiff was not entitled to call upon the defendants to refund the £2,500, or any part of it.

ACTION to recover £2,500 and interest from the 27th of April, \*1874, under the circumstances stated in the [61] following special case:

1. The plaintiff is a merchant carrying on business in London under the style of J. R. Yglesias & Co., and the defendants are bankers there.

2. On the 25th of November, 1873, the defendants granted and delivered the following letter of credit to Messrs. J. R. Yglesias & Co.:

6 Lombard Street, 25 Nov., 1873.

Mercantile Bank of the River Plate, Limited.

No. 13. £15,000 sterling.

Messrs. J. R. Yglesias & Co.

Dear Sirs,—We hereby authorize you to draw on us at 90 <sup>d</sup>/<sub>a</sub> to the extent of £15,000 sterling against shipments of materials for tramways to Monte Video; said drafts to be accompanied by invoice and full set of bills of lading in our name, and draft at three months' date on Mr. F. P. Santayana for amount of invoice and your charges; insurance to be effected by us. This credit to be in force for six months from this date.

For the Mercantile Bank of the River Plate, Limited,

Ch. Raphael, Manager,

J. H. Duncan, Secretary.

3. The plaintiff acknowledged the receipt of this letter of credit by the following memorandum, which contains the terms upon which the letter of credit was granted,—

To the Mercantile Bank of the River Plate, Limited.

Gentlemen,—We have received from you a letter of credit, No. 13, in our favor, for £15,000 sterling.

The drafts against this letter of credit will be drawn at 90 days' sight. Our drafts under this letter of credit will be accompanied by our drafts at three months' date on Mr. F. Santayana, of Monte Video, for amount of invoice and our charges; and, in the event of non-payment of such drafts, we authorize you to realize the goods represented by the

1877

Yglesias v. River Plate Bank.

documents attached, and hold ourselves responsible for any deficiency that may arise, subject of course to your communicating with us before you take this extreme course.

We engage to pay you  $1\frac{1}{2}$  per cent. commission, interest for four months at 5 per cent. per annum (and, if the Bank of England rate be higher, this latter rate), and 1 per cent. for postage and petties. We authorize you to effect the insurance at the current rate, and engage to reimburse you here the amount of premiums.

The goods shipped under this credit being insured with first-class underwriters, we shall not make the bank responsible for any question or claim that may arise in respect of the insurance or damage, nor for any greater claim than the sum recovered from the underwriters. At the same time, the bank will use its best endeavors to obtain payment of whatever claim may be made, upon receipt of the necessary documents, without charging any other commission.

(Signed) J. R. Yglesias & Co.

62] \*4. The plaintiff accordingly drew drafts upon the defendants, and handed to the defendants the documents in the letter of credit mentioned; and the drafts were accepted by the defendants and were in due course paid by them. Mr. F. P. Santayana mentioned in the plaintiff's letter of the 25th of November, 1873, was the person on whose behalf the materials were shipped by the plaintiff, and was the person liable to provide for the drafts drawn upon him by the plaintiff and handed to the defendants.

5. Two of the drafts drawn by the plaintiff upon Santayana were duly paid by him at maturity, and the documents representing the goods for which such two bills were accepted were thereupon handed by the defendants to him. The remainder of the drafts were dishonored by him on presentation.

6. Upon the fact of such dishonor becoming known to the defendants, they wrote and sent the following letter to the plaintiff:

Messrs. J. R. Yglesias & Co. London, April 27, 1874.

Dear Sirs,—In reference to our conversation with your representative to-day, and in consequence of your drafts on Mr. Santayana having now twice been dishonored, we beg to communicate to you that it is our intention, in the case of your draft for £1,020 17s. already advised as unpaid, and of all the other remaining bills in case of their being also dishonored, to realize the goods at once, unless other provision is previously made for the bills. We shall be glad to

be favored with your reply (should you have anything to communicate) this afternoon before 4.30, as we are telegraphing the instructions to-day.

Negotiations then took place between them as to what should be done; and on the same 27th of April, 1874, the plaintiff handed to the defendants a check for £2,500, upon the terms mentioned in the following letter:

To the Mercantile Bank of the River Plate, Limited.

Gentlemen,—In reply to your favor of this day's date, we beg to say that it would be very much against our interests if you were to telegraph to your branch at Monte Video to sell the tramway materials attached to our drafts on Mr. F. P. Santayana for £1,020 17s. due 19th March, £2,714 19s. due 30th March, £1,704 10s. 3d. due 2d instant, £1,306 11s. 6d. due 8th instant, £1,321 16s. 3d. due 20th instant, £4,161 due 6th May. And, to prevent this, we beg to hand you herewith, in compliance with your suggestion, a check for £2,500, which please encash and hold the amount as collateral security for the above six bills on Mr. Santayana; but, when they are paid, with charges, you will of course refund us these £2,500.

We presume you will pay us interest on this amount. If not, we prefer investing \*it in consols, and depositing [63 the same with you until Mr. Santayana's bills are paid. We shall feel obliged by your kindly informing us on this head, and by your instructing your branch in Monte Video by next mail to understand with Messrs. Jose Firmat & Co., and to adopt conjointly with them, such measures for the settlement of this very unsatisfactory business as are likely to give us the least possible loss, or not any, if possible.

(Signed) J. R. Yglesias & Co.

7. The defendants acknowledged the receipt of the said letter and check by the following letter:

London, April 28th, 1874.

Messrs. J. R. Yglesias & Co.

Dear Sirs,—We beg to acknowledge receipt of your favor of yesterday inclosing check for £2,500, being additional security for your outstanding drafts on M. Santayana. An account showing the amount of interest due to you will be rendered hereafter.

8. The defendants encashed the check, and have retained the proceeds thereof to the present time.

9. According to the law of Uruguay, a creditor holding

1877

Yglesias v. River Plate Bank.

security cannot lawfully realize it except by means of a judicial sale under the order of the judge of the Tribunal of Commerce. The defendants commenced proceedings before the judge of the Tribunal of Commerce at Monte Video to obtain an order to realize their security by the judicial sale of the rails. Mr. Santayana appeared and opposed those proceedings, and the proceedings terminated in an arrangement entered into between the defendants, through Mr. Flowerdew, their manager at Monte Video, and Santayana.

10. This arrangement was entered into in an act of court, of which the following is a translation :

To the commercial judge. We, Don Guillermo Flowerdew, manager of the Mercantile Bank of Rio de la Plata without revoking power, and Don F. P. Santayana, acting on his own behalf in the proceedings initiated in the name of the bank, praying authorization to effect the sale by public auction of a quantity of rails, iron tie-bars, and other materials, consigned to the bank and affected to the payment of sundry bills exhibited and protested unto your honor in the most valid form,—show that by common consent we terminate the said proceedings upon the basis following :

(1.) The bank is at liberty freely to dispose of the effects consigned to the order thereof, and thereout or out of the proceeds thereof to pay to itself the bills protested, which are to be considered as cancelled, Santayana paying the costs and charges of the said proceedings :

(2.) Simultaneously with the act of effecting the payment of costs and charges, after taxation of the former and [64] regulation of the fees of the advocate and \*attorney, the bills shall be delivered up to Santayana under a certificate passed before the registrar, and in the form of the disannexed minute appearing at fo. —.

(3.) It is likewise agreed that, immediately on the statement of costs being made out, Santayana is to pay in the amount thereof, proceeding to distribute the same after delivery of the bills, in presence of the registrar, pursuant to what has been established on the preceding basis. For all necessary legal purposes consequent thereon, we pray your honor to hold us as present, and, after ratification of the signatures as authentic proof of the truth of what has been agreed upon, to be pleased to order that the same be carried into due effect. Justice so requiring, &c.

(Signed by all requisite parties, and duly certified.)

11. In pursuance of this agreement the defendants, on payment of the costs by Santayana, gave up to him the whole of the bills mentioned in the letter of April 27th, 1874, as cancelled; and the defendants then took possession of the materials, and have disposed of the same as they pleased, without reference to the plaintiff or to Santayana or any other person.

12. The plaintiff afterwards received the cancelled bills from Messrs. Theule, Santayana & Co., of Havre.

13, 14. Copies of the bills were set out in a schedule, which, with certain correspondence, were to be referred to, if necessary.

15. Messrs. Jose Firmat & Co. were a firm carrying on business in Buenos Ayres. The plaintiff was a partner in that firm, but resided and carried on business in London.

16. The interest on the £2,500 to the date of the writ amounts to £275 8s.

The question for the opinion of the court was, whether under the circumstances stated the defendants were entitled to retain the £2,500.

The case was argued on the 3d and 5th of December, 1877, by

*Benjamin, Q.C. (Petherham with him), for the plaintiff, and*

*Cohen, Q.C. (Edwyn Jones with him), for the defendants.*

The course of the argument will sufficiently appear by the judgment.

*Cur. adv. vult.*

Dec. 17. The judgment of the Court (Grove and Lindley, JJ.,) was delivered by

LINDLEY, J.: The plaintiff in this action seeks to recover from the defendants a sum of £2,500 placed by him in their hands as collateral security for the payment of certain overdue and dishonored bills of exchange. These bills were drawn by the plaintiff on and accepted by a Mr. Santayana, and were held by the defendants; and, after the £2,500 had been given as collateral security, an arrangement was made between Santayana and the defendants by virtue of which the bills were cancelled and were given up to him by the defendants. The plaintiff was not a party to this arrangement; and he contends that, although the bills have not been paid in fact, yet, as they have been cancelled, they must be treated as having been paid, and that consequently he is entitled to have back his £2,500.

Now, the effect of the cancellation of the bills was un-

1877

Yglesias v. River Plate Bank.

doubtedly to discharge both the plaintiff and Santayana from all liability on the bills themselves, and, further, to deprive the plaintiff, as drawer, of all remedy on the bills against Santayana, as acceptor.

Further, by cancelling the bills, the defendants must be treated as having received what but for such cancellation they might have recovered from the acceptor; so that, if he had been solvent, the defendants could not now sue the plaintiff either on the bills or for the consideration for which they were given, if the bills were equal in amount to such consideration: see *Peacock v. Pursell* ('). But, in this case, the acceptor was unable to pay the bills; and their cancellation under the circumstances disclosed in this case is not in our opinion equivalent to payment in full.

The circumstances which led to the giving of the bills, and to their subsequent cancellation appear in paragraphs 2, 3, 6, 7, and 9 of the special case, which I will not stop to read now. The defendants in effect lent the plaintiff £15,000 on the security,—1, of certain tramway materials, and,—2, of the bills of exchange in question. The tramway materials were not to be sold without notice to the plaintiff. When the bills were dishonored, the £2,500 was given as collateral security for their payment. In other words, the £2,500 was given as further security for the loan of £15,000. Afterwards, the plaintiff authorized a sale of the materials; but the defendants found that they could not sell them without taking legal proceedings for the purpose against 66] \*Santayana. Such proceedings were taken, and he ultimately consented to a sale on the terms of having the bills cancelled, which was done.

It is plain that by this arrangement the defendants did not intend to give up any security they held, except the bills; and it was admitted that the materials and the £2,500 together were not more than sufficient, and indeed *not* sufficient, to repay the loan of £15,000 to secure which they were given. Further, it was not contended that the bills would have been paid in full by Santayana if they had not been cancelled; but, unless they would, their cancellation did not of itself discharge the debt of £15,000 and entitle the plaintiff to have back the securities held by the defendants for it. So long as that debt or any part of it remains unpaid or unsatisfied or undischarged, it appears to us that the plaintiff cannot recover any of the securities given for it.

The defendants were entitled to appropriate the £2,500 to

(') 14 C. B. (N.S.), 728; 32 L. J. (C.P.), 266.

the discharge of that debt as soon as they received the money; and they are entitled to be treated as having done so, and are not, in our opinion, bound to refund that sum or any part of it to the plaintiff, unless on taking a proper account a balance is found to be against them.

The terms of the letter of the 27th of April, 1874, to our minds support the view we take,—“When they (i.e. the six bills) are paid, with charges, you will of course refund us the £2,500.” The event contemplated, viz., the payment of the six bills in full, with charges, has not happened; and, when consent was given by the plaintiff to the sale of the materials, it was, we think, assumed that the bills would not be paid, and the sale of the materials was left to the discretion of the defendants. The agreement pursuant to which the bills were cancelled was not an agreement to the effect that they were to be treated as paid, but was an arrangement for paying them; and, until they have been paid in fact, they ought not (although cancelled) to be treated as paid, within the true meaning of the letter of the 27th of April, 1874.

The real right of the plaintiff in our opinion is, to have an account taken of what is due to the defendants in respect of the original loan and interest, and of what they have realized or might \*but for their own negligence have [67 realized by means of their securities. The defendants, in other words, are liable to be charged in account with the real value of the cancelled bills, but are not to refund the £2,500, which is the contention of the plaintiff.

For these reasons, we give judgment for the defendants.

*Judgment for the defendants.*

Solicitors for plaintiff: *Nicol, Son & Jones.*

Solicitors for defendants: *Mackrell & Co.*

---

[3 Common Pleas Division, 80.]

Nov. 20, 1877.

\*GRANT, *Appellant*; THE OVERSEERS OF PAGHAM, [80  
*Respondents.*

*Parliament—County Vote—Disqualification by Reason of Bribery—31 & 32 Vict.  
c. 125, s. 43.*

In order to disqualify a candidate from being registered as a voter, by reason of personal bribery, or bribery by an agent with his knowledge and consent, under 31 & 32 Vict. c. 125, s. 43, h. must be *found* by the report of the election judge under s. 11, subs. 14, to have been <sup>n</sup>guilty; it is not enough that the judge states facts from which personal bribery (& other corrupt practice might be inferred.

1877

Campbell v. Strangeways.

[3 Common Pleas Division, 105.]

Nov. 23, 1877.

105]

## \*CAMPBELL V. STRANGEWAYS.

*Day—Fraction of—Keeping Dog without license—License subsequently obtained on the same Day—30 Vict. c. 5, ss. 5, 8.*

On the 21st of October, the respondent kept a dog without having in force a license granted under 30 Vict. c. 5. He thereby became liable to a penalty under s. 8. His default was discovered by the excise, and he took out a license at a later hour on the same day.

Sect. 5 enacts that every license shall commence on the day on which the same shall be granted.

An information against him laid before a magistrate, charged his offence to have been committed on the 21st of October. At the hearing, he produced the license granted on the 21st of October, and the charge was dismissed:

*Held*, that the dismissal was wrong, because an offence had been committed on the 21st of October, and the subsequent license operated only from the time when it was granted, and did not relate back to the earliest moment of that day so as to justify the violation of the act before the license existed.

CASE stated by a police magistrate, under 20 & 21 Vict. c. 43.

On the 21st of October, the appellant, an excise officer, called at the house of the respondent, at about 12.40 P.M., and there saw a dog, above the age of six months, kept by him. No license for the dog was then in force. On the same day at 1.10 P.M. the respondent took out a license authorizing him "to keep one dog . . . from the date hereof, until December the 31st, 1877."

106] \*The appellant laid an information against him, which charged that "on the 21st of October, 1877," the respondent kept a dog without a license<sup>(1)</sup>.

At the hearing of the information the respondent produced the license. The magistrate being of opinion that the license was an answer to the information, dismissed the charge.

The question was whether his decision was right.

*Lockwood (C. Bowen*, with him), for the appellant: The magistrate was wrong. In deciding the case the precise times at which the penalty was incurred and the license

(1) 30 Vict. c. 5, imposes an excise duty in respect of dogs, and provides for the granting of licenses to keep them. By s. 5, the licenses to be taken out under this act shall be in such form and shall be granted by such officers of Inland Revenue as the Commissioners of Inland Revenue shall direct; and every license shall commence on the day on which the

same shall be granted, and shall terminate on the thirty-first day of December following. By s. 8: If any person shall keep a dog without having in force a license granted under this act, authorizing him so to do . . . he shall for every such offence forfeit the sum of five pounds.



granted ought to have been regarded: Chitty's Archbold's Practice, 12th ed., p. 164. Lord Mansfield said in *Combe v. Pitt* (\*), that "though the law does not in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done; for it is not like a mathematical point which cannot be divided." So likewise, Patteson, J., in *Chick v. Smith* (†) said: "The good sense of the matter is, that where it is necessary to show which was the first of two acts, the court is at liberty to consider fractions of a day. The rule of law would be otherwise absurd." The license may commence on the day, and yet only operate from the moment at which it was actually granted. When that time is ascertained to have been after the offence, then both a conviction and the license would be consistent.

[LINDLEY, J.: The license authorizes the respondent to keep one dog "from" the date thereof. The form is wrong. It is not in accordance with the words of s. 5.

GROVE, J.: The provision that the license shall terminate "on" the 31st of December, no doubt means at the end of that \*day. But in strict grammatical construction, [107 "on the 31st of December" would mean "when the 31st of December has arrived." And the word used should have been "with."]

The respondent seeks to avail himself of a general rule of law, but his case is within the exception to it, and if the court might not here regard the part of the day at which the license came into existence, the act would be often violated with impunity.

GROVE, J.: We are now satisfied that the decision of the magistrate was wrong, although much could be said in favor of it. Effect can only be given to the act and to the language of sect. 8, by holding that the offence was actually committed on the date alleged, and could not be purged by the defendant taking out a license at a later hour of the same day. *Chick v. Smith* (†) and the other cases cited explain where the law will distinguish the fractions of a day, viz., where it is necessary—not merely as was once said, for the "purposes of justice," which is a vague expression, but—for the purposes of the decision to show which of two events first happened. Undoubtedly, the defendant did "keep a dog without having in force a license granted under this act authorizing him so to do" contrary to the terms of sect. 8. But can the operation of that section be modi-

(\*) 3 Burr., 1434.

(†) 8 Dowl., 337, at p. 340.

(\*) 8 Dowl., 337.

1877

Campbell v. Strangeways.

fied or changed by the words used in s. 5, declaring that "every license shall commence on the day on which the same shall be granted, and shall terminate on the 31st day of December following"? The object of s. 5 is that if a person does not take out a license on the first day of the year, a license afterwards taken out shall not cover the preceding part of that year; for example, if granted on the 1st of June it shall not run from the 1st of January; and the provision that the license shall commence "on" the day does not necessarily mean that it shall begin at the first moment of the day, but that it shall not go further back than that day. Our judgment will in no wise contradict this provision, because we decide that the license did commence on the day on which the same was granted. Suppose after this offence a valid conviction had been signed and sealed on the same day, that would have been a true and proper conviction at the time, and could not \*have been overruled or altered by the defendant, on the same day but subsequently, taking out a license, which could be rightly said to run back through the doctrine of relation to the beginning of the day, and so make the conviction wrong. If our construction of sect. 5 be correct, then we may regard the fractions of the day, for otherwise the events of it would be subsequently varied by the conduct of the parties on the day. We hold that the sections can be read in a manner not inconsistent with each other, that the respondent did "keep a dog without a license," that the license afterwards granted "on" the same day, commenced "at and from" the time when actually issued, and was no protection to him for the past offence, and that he was, therefore, liable.

LINDLEY, J.: I have arrived at the same conclusion. At first I was rather inclined to take the view of the magistrate, partly because I thought a man might buy a dog at, say, 8 o'clock A.M. and not take out a license until 4 P.M. on the same day, and yet be convicted, although he may not have had the time or opportunity to have obtained a license sooner after the purchase. But the answer perhaps would be that the words of section 8 are not "have" but "keep" a dog, and that during the short interval of possession between the purchase and the time of taking out a license he could not be said to "keep" the dog so as to bring himself within the terms of the enactment. The case, however, turns on the true construction of ss. 5 and 8. By s. 5, the form of the license is left to the officers of Inland Revenue, and although they are not bound to adopt any particular form, yet it must not be inconsistent with the act. But this

license is not inconsistent with it. Section 5 declaring that the license shall commence on the day on which the same shall be granted, the license, *prima facie*, would cover the whole day, because there would be no necessity for distinguishing one part of the day from the other. But when s. 5 has to be construed with s. 8, we may be compelled to split the day into parts, and I think that in this case we are compelled. The authorities cited show that we may do so, and when, looking to the order of events, we find first, the offence committed, and then that the respondent \*got a [109 license after the offence, I think we should go too far were we to say that because the word "on" is used in s. 5, an offence committed on a day can be purged by obtaining a license at a later period of the day. I agree with my Brother Grove, in thinking that we can properly construe "on" as "at and from," and therefore there will be no inconsistency. The Legislature probably meant to prevent a man taking out a license to cover previous defaults. I think the offence here was complete, and that the mere fact of taking out a subsequent license did not affect it.

*Decision reversed.*

Solicitor for appellant: *The Solicitor to the Inland Revenue.*

See 28 Eng. Rep., 754 note.

The law does not in general take cognizance of fractions of a day: *Louisville v. Portsmouth*, 14 Cent. L. J., 108, 25 Alb. L. J., 86, 14 Chicago Legal News, 161, 3 Morr. Tr., 407, 13 Reporter, 193.

But the courts may do so when substantial justice requires it: *Louisville v. Portsmouth*, 14 Cent. L. J., 108, 25 Alb. L. J., 86, 14 Chic. Leg. News, 161, 3 Morr. Tr., 407, 13 Reporter, 193.

The second section of art. 14 of the Illinois Constitution went into operation on the 2d day of July, 1870. But it did not invalidate township bonds issued in aid of a railroad corporation pursuant to an election held on that day, at an hour prior to the closing of the polls of the general election, at

which the people of the State voted on the adoption of the Constitution—the bonds so issued to be applied in discharge of a donation voted in 1868 to be paid by special tax: *Louisville v. Portsmouth*, 14 Chic. Leg. News, 161, 3 Morr. Tr. 407, 13 Reporter, 193, 14 Cent. L. J., 108, 25 Alb. L. J., 86.

In a contest between an assignment and an attachment, fractions of a day are admitted; and the rule is, first in order first in time.

The service of an attachment is a virtual assignment in law of the claim attached. The assignee of a claim, therefore, by an assignment, after the service of an attachment, takes it subject to the rights of the plaintiff: *Malvin v. Sweetzer*, 1 Luzerne Leg. Reg. Rep., 5.

1877

Steel v. Lester.

[3 Common Pleas Division, 116.]

Dec. 7, 1877.

**116] \*ELMORE V. HUNTER and Another.**

*Ship and Shipping—Barges on Thames in Tow of Tug—"Worked or Navigated," 22 & 23 Vict. c. cxxxiii (Watermen's and Lightermen's Amendment Act, 1859), s. LXVI, by-law 60—Thames Conservancy by-law 16.*

22 & 23 Vict. c. cxxxiii: An act for the Better Regulation of the Barge Owners and others connected with the Navigation of the River Thames between Teddington Lock and Lower Hope's Point, by s. lxvi, enacts that no barge or other like craft for the carrying of goods shall be "worked or navigated" within the limits of the act, unless there be "in charge of such craft" a lighterman licensed or apprentice qualified as therein mentioned.

Six barges fastened together in pairs were towed by a steam-tug on the river within the limits of the act. Four men were in charge, but no one was on board either of the two last barges:

*Held*, that the two barges were "worked or navigated" in contravention of the act, which required a qualified person to be on board each barge to manage it, in case of separation or accident.

[3 Common Pleas Division, 121.]

Dec. 7, 1877.

**121] \*STEEL V. LESTER and LILEE.**

*Negligence—Ship—Liability of "Managing Owner," for negligence of Captain trading independently and rendering a Share of Profits to Owner—Merchant Shipping Act, 1875 (38 & 39 Vict. c. 88, s. 4, subs. 5).*

A sloop was navigated under a verbal agreement between A., the "managing owner," registered according to the Merchant Shipping Act, 1875, and B., the captain, by which, on condition that A. should have one-third of the net profits, accounts of which were to be rendered to him by B. from time to time, B. was at liberty to go to any port, and take or refuse any cargo he chose, and was also to hire and pay the crew and supply the stores, A. having no control over the vessel. While discharging cargo under a charter made by B. "for and on behalf of the owner," the vessel, through the negligence of B., broke loose from her moorings and damaged the wharf of the plaintiff, who brought an action against A. and B.:

*Held*, that the agreement did not amount to a demise of the vessel and, whatever was the precise relationship thereby created between the defendants *inter se*, A. was responsible to the public for the negligence of B., and, therefore, both were liable in the action.

CASE stated on appeal from the Lincolnshire county court.

This action was brought against the defendant Lester as the owner, and the defendant Lilee as the master of a sloop, for damage to the plaintiff's wharf by the sloop breaking loose from her moorings under circumstances, which in the opinion of the county court judge showed negligence by the defendant Lilee in the management of the vessel. The material facts proved were as follows: The defendant Lester,

who was a merchant living and carrying on business at Stoke upon-Trent, in Staffordshire, purchased in May, 1873, the sloop *Anne*, which was duly transferred to him and registered in his own name as the owner, he was afterwards registered as the "managing owner," under the provisions of the Merchant Shipping Act, 1875 (38 & 39 Vict. c. 88, s. 4, subs. 5). For about three months after the defendant Lester purchased the vessel he traded with her on his own account, employing the defendant Lilee as skipper, paying him standing wages; at the end of three months from his purchase of the sloop he agreed verbally with the defendant Lilee that he should take the ship wherever he chose on condition that he (Lester) should have a third of the net profits. Lilee was to be at liberty \*to go to any port [122 and to take any cargo he chose, and to refuse any cargo, he was also to engage the men, and Lester had no control over the vessel. Lilee was to render to Lester accounts of his profits from time to time, and this state of things continued till after the collision—Lester selling the vessel in October, 1876. In the month of March, 1876, the defendant Lilee entered into a charterparty, expressed to be made "between Captain Lilee, master, for and on behalf of the owner" of the ship, and the charterers. The sloop arrived at Spalding, the port therein named, in due course, and after partially discharging the cargo remained several days at the port under the charterparty, and whilst so remaining the damage was occasioned to the plaintiff's wharf by reason of the negligence of the defendant Lilee.

The defendant Lester was not consulted by the defendant Lilee as to the contract for taking the cargo, and never saw or heard of the charter party till after the commencement of the action; he was not present at the port of Spalding when the vessel arrived there, or at any time thereafter during the stay at the port, and he did not take any part in the management of the vessel during the voyage to or whilst she remained at the said port. The men employed in navigating the vessel on such voyage (as on all previous voyages during the existence of the agreement between the two defendants) were hired and paid by the defendant Lilee, who found all stores required for the ship and paid to the defendant Lester one-third of the profit realized by the voyage. The county court judge gave judgment against both defendants for the amount of the damage proved. The defendant Lester only appealed, and the question was whether he was legally liable for the negligence of the defendant Lilee in the management of the ship.

1877

Steel v. Lester.

*F. T. Streeten*, for the appellant: The owner and captain were not partners in the ship. Mere perception of profits may be evidence of a partnership, but any *prima facie* presumption raised from the receipt of profits is rebutted by the terms of the agreement showing that there was no agency between the parties: *Cox v. Hickman* ('); *Bullen v. Sharp* ('). 123] The whole agreement must \*be considered: *Ross v. Parkyns* ('). As Jessel, M.R., said of the contract in that case, so here, "There is not a word about partnership in it from beginning to end." The reservation of profits was only a mode of payment for the use of the vessel. Lilee was the trader, Lester having no control.

[LINDLEY, J., cited *Pooley v. Driver* (').]

Secondly, there was no relationship of master and servant, employer and employed, or principal and agent, so as to make the superior liable for the negligence of the subordinate. The captain engaged and paid the seamen, and if they were incompetent Lester could not have dismissed them. They were the servants of Lilee only: *Milligan v. Wedge* ('); *Reedie v. London and North Western Ry. Co.* ('). In *Fraser v. Marsh* ('), it was held that the registered owner of a ship, having chartered her to the captain at a rent for a certain number of voyages, was not liable for stores furnished to the ship by the order of the charterer during the charterparty. Lord Ellenborough, C.J., said, "The Register Acts were passed *diverso intuitu*; but to say that the registered owner, who divests himself by the charterparty of all control and possession of the vessel for the time being in favor of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by order of the captain during that time, would be pushing the effect of those acts much too far," and that case in principle applies, for although there may have been here no actual demise of the vessel there was a letting and hiring to the captain with absolute control.

[GROVE, J., cited *Fowler v. Lock* (').]

There the plaintiff obtained from the defendant a horse and cab to drive on the usual terms, viz., that the driver should daily hand over a certain sum of the earnings and retain the remainder, and the defendant had no control over him. The Court of Common Pleas was divided in opinion

(1) 8 H. L. C., 268; 30 L. J. (C.P.), 125.

(\*) 4 Ex., 244.

(2) Law Rep., 1 C. P., 86.

(\*) 13 East, 238.

(3) Law Rep., 20 Eq., 331; 13 Eng. R., 824.

(\*) Law Rep., 7 C. P., 272; 2 Eng. R., 586; Law Rep., 10 C. P., 90; 11 Eng. R., 268.

(4) 5 Ch. D., 458; 22 Eng. R., 214.

(5) 12 Ad. & E., 737.

on the question whether the relation between the parties was that of bailor and bailee or master and servant. In *Venables v. Smith* <sup>(1)</sup> where a cab was driven under a \*similar agreement, the Queen's Bench Division held [124 the owner responsible to a person injured by the negligence of the driver; but so decided because of the Hackney Carriage Acts, which, as Cockburn, C.J., says, were "expressly passed for the protection of the public."

*Finlay*, for the respondent: It is immaterial whether the owner and captain were partners or master and servant. There was some evidence of one or the other relationship, and either would suffice to entitle the plaintiff to recover against both defendants. The present question is, was there any evidence for a jury. The judge acted as jury. The Merchant Shipping Act, 1875 (38 & 39 Vict. c. 88), s. 4, requires that "the owner of every British ship shall from time to time register . . . the name of the managing owner, and if there be no managing owner, then of the person to whom the management of the ship is intrusted by and on behalf of the owner." Lester registered himself as "managing owner" and not Lilee. But if the contention for the appellant were correct, Lilee would have been registered. The action is not between owner and captain *inter se*, but by one of the public against them. Lester is responsible to the public, as the defendant was held to be in *Venables v. Smith* <sup>(1)</sup>, which is an authority for the plaintiff. He would have been punishable for offences under the act.

[GROVE, J.: Then the finding in the case that Lester had no control over the vessel seems contradictory.

LINDLEY, J.: He had control over the master, not over the ship.]

And held himself out to the world as the "managing owner" by means of the register. [He was stopped.]

*Streeten*, in reply: The act was passed to "make provision for giving further powers to the Board of Trade for stopping unseaworthy ships" as the title states. The scope of it is to protect sailors, and not the public generally.

GROVE, J.: I think the judgment below was right. The question is whether the relation of master and servant existed between the defendants, or, to treat the matter more broadly, Lester \*remained liable for the acts of Lilee, [125 or whether Lester had divested himself of all control, and had parted with the ship, either absolutely or for a term, and was therefore not in any way responsible for the management. The case which at first seemed most adverse to the

<sup>(1)</sup> 2 Q. B. D., 279; 20 Eng. R., 345.

1877

Steel v. Lester.

decision of the county court judge was *Fraser v. Marsh* <sup>(1)</sup>, where a vessel had been demised by the owner to the captain, and it was held that by parting with the ship the owner had divested himself of all control, and that the ordinary relation of owner and captain did not exist. But there was in that case an absolute demise and disposition of the vessel for the time, and further, there was not at that date the necessity for registering some one as the "managing owner" under the Merchant Shipping Act, 1875, which has since been passed, and creates a relation to the public in order that some person shall be responsible for the vessel being properly fitted and conducted, and that injury to the public may be guarded against. Two distinctions between the present case and *Fraser v. Marsh* <sup>(1)</sup> exist. First, that in *Fraser v. Marsh* <sup>(1)</sup> there was an absolute demise, while here, as the county court judge has found, there was no demise, and secondly (for I draw the same inference from the facts that he did) that there was not an absolute parting with this vessel which would sever the control, but that Lester retained control through the captain, and still remained responsible to the public <sup>(2)</sup>. Another case cited was *Fowler v. Lock* <sup>(3)</sup>. The distinction there is manifest. That action was brought by a cabman against a cab owner for supplying him with an unfit horse. The parties had not the ordinary relations of master and servant in one sense of the term; the driver used the cab at his pleasure during the day, and paid the owner a certain sum per diem for it. A majority of this court held that, as between the driver and proprietor, the relations were not those of master and servant but of bailor and bailee, and that the proprietor was responsible to the driver, and a verdict for the plaintiff was upheld. The case went to the Exchequer Chamber, [126] \*where no express decision was pronounced, but the court sent the case down to a new trial on the question as to who took the risk of the adventure. Again the verdict was for the plaintiff, and came back to the Exchequer Chamber, and they declined to disturb it. If the present action had been by Lilee against Lester, then *Fowler v. Lock* <sup>(3)</sup> would have had strong application. But it is not so, it is an action by one of the public against both of them. In *Fowler v. Lock* <sup>(3)</sup>, the court did not in any way decide whether the

<sup>(1)</sup> 13 East, 238.

<sup>(2)</sup> Also in *Fraser v. Marsh* the question was as to the liability of the registered owner on contracts entered into by the

captain; not whether he was responsible for the captain's negligence.

<sup>(3)</sup> Law Rep., 7 C. P., 272; 2 Eng. R., 586; Law Rep., 10 C. P., 90; 11 Eng. R., 268.



relations of master and servant, although not existing between the two parties themselves, might exist as regards the public, a question previously determined by *Powles v. Hider* (\*). The action in *Venables v. Smith* (\*) was not, as in *Fowler v. Lock* (\*), by cab driver against proprietor, but by a third person against the proprietor for bad driving. The Queen's Bench Division apparently assented to *Fowler v. Lock* (\*) (which was not, however, to my mind applicable) and held that the driver was, *quoad* the plaintiff, the servant of the defendant, and was acting within the scope of his employment at the time the accident occurred, so as to make the defendant liable for the consequences thereof. Therefore *Venables v. Smith* (\*) is, so far as it goes, in favor of the decision below. There are possible distinctions which might be taken, but it cannot be cited as an authority to the contrary. On first reading the case I was struck by a passage in which it is stated that Lester had no control over the vessel, and I thought that afforded an argument for the appellant, because it showed that Lester had parted with all control, and had therefore put himself in the position of the owner in *Fraser v. Marsh* (\*). True it is that in selecting the port and cargo Lester had no control, and that is so in nearly all voyages; but the statement in the case is capable of a full interpretation, viz., that Lester had no control as to the ports and cargoes, and yet remained responsible owner, proprietor, and manager of the vessel, as regarded the general public; and this is founded on two important matters, first, the Merchant Shipping Act, requiring the managing owner to be registered, or if there be no managing owner, that somebody \*must be registered as such. [127 Lester was registered as managing owner, and therefore he did not give up responsibility under this act, and, as I think, his general responsibility to the public for damage done by the ship. He might have done so. If he had demised the ship so as to cease to be managing owner he might have registered Lilee, and then the case would have been different. But Lester did not do this. He by his own act remained managing owner, and therefore that was evidence on which the county court judge would reasonably conclude that he continued responsible to the public. Secondly, he never gave up an interest in the adventure, but continued to have a joint interest to the extent of one-third of the profits. It is unnecessary to decide whether that rendered him in every

(\*) 6 E. & B., 207; 25 L. J. (Q.B.), 331. 586; Law Rep., 10 C. P., 90; 11 Eng. R.,

(\*) 2 Q. B. D., 279; 20 Eng. R., 345. 268.

(\*) Law Rep., 7 C. P., 272; 2 Eng. R., (4) 13 East, 238.

1878

Bradburn v. Foley.

the farm, he took to and paid for the seeds, acts of husbandry, and tillages, &c., to the then outgoing tenant Thomas Wilson, and he did this under and by virtue of the terms of the agreement (').

130] \*2. On the 29th of September, 1876, notice to quit the tenancy on the 25th of March, 1877, was given by Davies to the defendant.

3. On the 11th of October, 1876, Davies filed his petition for liquidation in pursuance of the Bankruptcy Act, 1869, and on the 27th the plaintiff was duly appointed trustee under the liquidation. Shortly after the plaintiff's appointment as trustee the defendant caused the plaintiff to be served with a notice under the Bankruptcy Act to disclaim or elect to continue the tenancy for the remainder of the term; and on the 29th of November, 1876, the plaintiff as such trustee elected to continue. On the 25th of March, 1877, a new tenant, one James Timmons, took and entered upon the farm by agreement with the defendant, and still is in possession of the same.

4. No agreement was entered into or valuation made between Timmons as incoming tenant and the plaintiff as outgoing tenant, and, although the plaintiff requested Timmons to take to the seeds, acts of husbandry, and tillages, he refused to do so; and thereupon the plaintiff requested the defendant as landlord to consent to have a valuation of the seeds, acts of husbandry, and tillages, &c., and to pay the amount of such valuation to the plaintiff; but he also refused to do so, and absolutely denied his liability.

5. It was agreed on both sides that, if the judge found for the plaintiff, the value of the seeds, acts of husbandry, and tillages, &c., should be settled by valuation in the usual way. It was also admitted on both sides that the plaintiff was entitled to be paid for the said seeds, acts of hus-

(') The agreement contained the following stipulation,—“The tenant to pay and compensate the said Thomas Wilson, as outgoing tenant (in exoneration of the landlord), for the ploughing and cleaning of all the turnips, fallows, and land sown with rye for sheep keep, and all the seeds, also half the crop of wheat, and also the swedes and other turnips not consumed, and also for all unconsumed hay, straw, and fodder; the tenant to consume and spend upon the premises all hay, straw (except such straw as shall be sold to the landlord as before mentioned), fodder, dung, turnips, or other green crops, manure, and compost to grow or be produced

thereupon, and to have the liberty of selling all such produce unconsumed at the determination of the tenancy (except straw and barley in the straw required to be purchased by the landlord as aforesaid, and except manure, which shall be left for the landlord free of charge) to the succeeding or incoming tenant, to be consumed on the premises, at a consuming price; and, if no incoming tenant, the same shall be sold to the landlord at a consuming price, which price shall be settled between him and the tenant by two indifferent persons, one to be nominated by each party, or by their umpire, in case of disagreement,” &c.

bandry, tillages, &c., by either \*the defendant as [131 landlord or by Timmons as incoming tenant. The question therefore for the judge's decision was from whom was the plaintiff entitled to recover the value of the said seeds, &c., whether from the defendant as his landlord or from Timmons as incoming tenant.

It was contended for the plaintiff that there was an implied contract between the defendant and Davies that at the termination of the tenancy the defendant would pay Davies for the seeds, acts of husbandry, and tillages, &c., and therefore that the plaintiff as trustee was entitled under such contract to recover the value of the same. It was also contended for the plaintiff that such implied contract arose from the agreement of the 16th of May, 1873, and also by the well-known custom of the country. Evidence was given on the part of the plaintiff that the custom of the country was for the landlord to pay the outgoing tenant for the seeds, acts of husbandry, tillages, &c., unless there was an agreement between the outgoing and incoming tenants that the incoming tenant should pay for the same.

For the defendant it was contended that he was not liable, and that by the custom of the country, when there was an incoming tenant who entered on the farm at the expiration of the tenancy of the outgoing tenant, he and not the landlord became liable to pay the outgoing tenant for the seeds, acts of husbandry, tillages, &c. Evidence was thereupon given on behalf of the defendant that such custom existed, and that the custom was that the incoming tenant should pay the outgoing tenant for the seeds, acts of husbandry, tillages, &c., and that the landlord was only liable when there was no incoming tenant.

By way of reply it was contended that no such custom as that set up by the defendant could in fact exist, and that such custom was unreasonable and bad.

The learned judge entered a verdict generally for the defendant upon the facts and evidence before him. He found that, by the custom of the country, the incoming tenant and not the landlord was liable to pay for the seeds, acts of husbandry, and tillages.

The questions for the opinion of the court were,—1. Whether such a custom as that set up by the defendant can in fact exist,—2. Whether, if such a custom can in fact exist, it is a good \*custom,—3. Whether upon the facts [132 stated the landlord or the incoming tenant is liable to the plaintiff for the seeds, acts of husbandry, and tillages, &c.

If the court should be of opinion that the first two ques-

1878

Bradburn v. Foley.

tions should be answered in the affirmative, and that the incoming tenant is liable, the judgment to stand. If either of the first two questions be answered in the negative, or if the court should be of opinion that the landlord and not the incoming tenant is liable, the verdict of the county court judge was to be set aside and a verdict entered generally for the plaintiff, subject to a valuation.

*Jelf*, for the plaintiff: Custom is something which adds an implied term to an already existing agreement: per Parke, P., in *Hutton v. Warren* (\*). The case states that there was no agreement between the outgoing and the incoming tenant: there being no privity of contract therefore between them, the incoming tenant cannot be liable to the outgoing tenant for the tillages; consequently the landlord must be, for it is conceded that the tillages must be paid for by some one. Under the terms of the agreement of the 16th of May, 1873, under which Davies took the farm, he paid the then outgoing tenant for the tillages expressly, as the agreement recites, "in exoneration of the landlord." It was clearly contemplated then that the landlord was the person who was *prima facie* liable according to the custom to pay the outgoing tenant for the tillages at the expiration of his tenancy, in default of any agreement between the outgoing and incoming tenants. And this is the established practice. It is so clearly laid down by Dallas, C.J., in *Dalby v. Hirst* (\*). "We are satisfied," says that learned judge (\*), "there was no good ground for contending before the jury that the custom, or rather usage, was unreasonable. It affords the strongest encouragement to good husbandry of farms; it is beneficial to landlords and tenants also; the land of the former receiving a lasting benefit from the labor and expense bestowed by the tenant, on payment of a reasonable compensation; and the latter being thereby encouraged to pursue a course of good husbandry by the [33] assurance he has that, if his \*continuance on the farm should not enable him to reap the full benefit of what he has done, he will have a right to call upon his landlord for proportionate compensation." The principle was admitted and acted upon in *Boraston v. Green* (\*); *Davis v. Connop* (\*); *Hutton v. Warren* (\*); *Faviell v. Gaskoin* (\*); *Codd v. Brown* (\*); and *Stafford v. Gardner* (\*); in which last-

(\*) 1 M. &amp; W., 466, at p. 475.

(\*) 1 Br. &amp; B., 224.

(\*) At p. 236.

(\*) 16 East, 71.

(\*) 1 Price, 53.

(\*) 1 M. &amp; W., 466.

(\*) 7 Ex., 278; 21 L. J. (Ex.), 85.

(\*) 15 L. T., 536.

(\*) Law Rep., 7 C. P., 242.

mentioned case the reason of the thing is very clearly stated by Willes, J. The questions are not very accurately put in the case: but the evident meaning is that the judge finds that the custom set up by the defendant exists in point of fact, if the court should be of opinion that it can be a legal one.

*J. D. S. Sim*, contra: The judge has undoubtedly found the custom of the country to be that the incoming tenant, and not the landlord, is liable to pay for the seeds, acts of husbandry, and tillages. The only question therefore is, as stated, whether that custom is a good one in point of law. It is neither unreasonable nor inconsistent with any agreement between the parties. It may be that, if there is no incoming tenant, the liability is *prima facie* cast upon the landlord. In *Faviell v. Gaskoin* (\*) this question seems to have been anticipated by Parke, B., when he says (\*), "I think that if there be no incoming tenant, the landlord is the person who, by the custom of the country, is bound to pay the outgoing tenant." But, he goes on to say, "by the custom of the country, when an incoming tenant takes possession, there is a contract implied upon his part, though *prima facie* the contract is with the landlord." In *Codd v. Brown* (\*) it was left to the jury as a question of fact. If the tenant enters, he must be assumed to have entered upon an implied understanding that, having taken to the tillages, he is to pay for that of which he takes the benefit.

[LINDLEY, J.: It certainly seems to me to be an unreasonable custom which would throw upon the outgoing tenant a person whom he does not know and with whom he has not contracted. Another element of unreasonableness would seem to be, that \*the landlord may maintain [134 trover, but the incoming tenant cannot.]

The custom here affirmed, if good, will avoid circuity of action: *Beaty v. Gibbons* (\*) and *Muncey v. Dennis* (\*) were also cited.

*Jelf*, was not called upon to reply.

*Cur. adv. vult.*

Feb. 1. The judgment of the Court (Lindley and Lopes, JJ.) was delivered by

LINDLEY, J.: It appears to us that, if the custom found to exist in this case can be supported in point of law, there is nothing in the lease under which the plaintiff held inconsistent with the custom, so as to exclude its application to

(\*) 7 Ex., 273; 21 L. J. (Ex.), 85.

(\*) 15 L. T., 536.

(\*) 7 Ex., at p. 280.

(\*) 16 East, 116.

(\*) 1 H. & N., 216; 26 L. J. (Ex.), 66

1878

Bradburn v. Foley.

him when his tenancy determined. It is very true that, when he went in, he agreed to pay the outgoing tenant's valuation, "in exoneration of the landlord:" but there is no provision in the lease to the effect that the landlord should compensate the plaintiff on his going out; and, apart from custom, no obligation so to do can be implied. The expression "in exoneration of the landlord" shows that the landlord was (or might be alleged to be) liable to compensate the plaintiff's immediate predecessor in the occupation of the farm: but, whether such liability was by reason of some custom or some contract, is not stated, and is not known to us; and, even if it were by reason of some supposed custom, the existence of such custom is inconsistent with the custom found in fact to exist.

The custom here found to exist in point of fact is to the effect that the incoming tenant, if there be one, is the only person liable to compensate the outgoing tenant: the custom as found exempts the landlord from liability altogether. Such a custom will be found, on examination, to involve the following consequences,—1. That the outgoing tenant has imposed upon him for his sole and exclusive debtor a person in whose selection he has no choice, and with whom he has made no contract at all,—2. That the incoming tenant has to make compensation to the outgoing tenant, irrespectively of the purposes for which he (the incoming tenant) may want the land, and whatever the terms between him and his landlord may be, and whether the incoming [35] tenant takes the land \*for a week, a month, a year, or a long term,—3. That the outgoing tenant can make no arrangement with his landlord as to his valuation, unless the incoming tenant is party to it and assents to it,—4. That, in the event of a letting and underletting, it is (on the custom as stated) uncertain who is to pay, viz., the immediate lessee from the landlord, or the ultimate tenant who takes possession,—5. That such a custom would lead any prudent tenant to run his farm out as much as by law he could, and to leave as little as possible for the incoming tenant to pay for.

A custom having such consequences as these appears to us so unreasonable, uncertain, and prejudicial to the interests both of landlords and tenants, as to be incapable of being supported in point of law. The argument that it is to the interest of the landlord to secure a solvent tenant, and that consequently the outgoing tenant runs practically little or no risk, does not meet all the grounds of unreasonableness above pointed out. Indeed, it does not adequately meet any

of them; for, it would be to the interest of an unscrupulous landlord to put in an insolvent man as tenant for a short time, so as to avoid having to pay the outgoing tenant himself, and yet to obtain possession before the poverty of the new tenant could be productive of injury.

The reasonableness or unreasonableness of a custom is a question of law for the court, see *Tyson v. Smith* <sup>(1)</sup>, and not a question of fact for the jury: and the principles applicable to such questions will be found in Com. Dig., Copyhold (S), and *Tyson v. Smith* <sup>(1)</sup>; and on these principles we proceed.

It may indeed be said that the custom here condemned is that which prevails in practice all over England; it being well known that, as a matter of fact the outgoing and incoming tenants usually settle questions of valuation between themselves, without referring to the landlord. This is, no doubt, true: but, if the practice is examined, it will be found to be based entirely on the principle that the landlord is liable by custom to the outgoing tenant, and that the incoming tenant is not liable to the outgoing tenant, where there is no contract express or tacit between them: see *Faviell v. Gaskoin* <sup>(2)</sup>; *Stafford v. Gardner* <sup>(3)</sup>; *Codd v. Brown* <sup>(4)</sup>.

\*The custom here found to exist is totally different: [136] it exonerates the landlord from all liability, and imposes a liability on the incoming tenant to the outgoing tenant, even in the absence of any contract express or tacit between them. There is no inconsistency, therefore, in condemning the custom and upholding the practice which is based upon a custom wholly opposed to that with which we have to deal.

Holding, as we do, that the custom found to exist in point of fact cannot be supported in point of law, we set aside the verdict of the county court judge, and direct a verdict to be entered for the plaintiff, subject to a valuation. The defendant must pay the costs of the action and of this appeal.

*Rule accordingly.*

Solicitors for plaintiff: *Walker, Son & Field*, for C. W. Collis, Stourbridge.

Solicitors for defendant: *Gregory, Rowcliffes & Co.*, for Barnard & King, Stourbridge.

<sup>(1)</sup> 9 A. & E., 406, at p. 421.

<sup>(2)</sup> 7 Ex., 273; 21 L. J. (Ex.), 85.

<sup>(3)</sup> Law Rep., 7 C. P., 242.

<sup>(4)</sup> 15 L. T., 536.

1878

Hindhaugh v. Blakey.

[3 Common Pleas Division, 186.]

March 2, 1878.

## HINDHAUGH V. BLAKEY.

*Bill of Exchange—Acceptance—1 & 2 Geo. 4, c. 78, s. 2—19 & 20 Vict. c. 97, s. 6.*

Since the passing of the statute 19 & 20 Vict. c. 97, s. 6, simply writing the name of the drawee across the face of a bill of exchange does not constitute a valid acceptance; there must also be upon the face of the bill some word or words indicating an intention on the part of the drawee to be bound by it as acceptor.

APPEAL from a decision of the County Court of Northumberland holden at Newcastle.

1. On the 14th of September, 1877, the plaintiff entered a plaint in the Newcastle county court against the defendant to recover £20 18s. 8d. The particulars of claim were as follows:

“Mr. George B. Blakey, Golden Lion Hotel, South Shields, to Robert Hindhaugh.

“1876. Oct. 6. To amount of your acceptance due this day £20 0 0

“1877. Sept. 12. To interest from Oct. 6, 1876, to Sept. 12, 1877, 341 days, at five per cent. per annum 18 8  
£20 18 8

137] \*2. On the hearing of the summons, the plaintiff produced the bill of exchange, of which the following is a copy:

“£20 0 0 1876. July 3d, Newcastle-on-Tyne.

“Three months after date pay to my order the sum of twenty pounds, value received.

Robert Hindhaugh.”

“Mr. Geo. B. Blakey,  
Golden Lion Hotel, South Shields.”

3. The plaintiff proved that he saw the defendant sign the bill by writing his name across it, that the bill was given for value, and that the sum of £20 18s. 8d. was due for principal and interest.

The defendant's solicitor then contended that the bill was not sufficiently accepted, according to 19 & 20 Vict. c. 97, s. 6, and that the plaintiff was not entitled to recover in consequence thereof.

The judge decided that the bill was not accepted within the meaning of 19 & 20 Vict. c. 97, s. 6, owing to the absence



thereon of the word "accepted," and gave judgment for the defendant, with costs<sup>(1)</sup>.

The question for the opinion of the court is, whether the bill is sufficiently accepted by the defendant by his writing his name across the bill, notwithstanding the omission of the word "accepted." If the court should be of opinion that the ruling of the judge was wrong in point of law, the judgment to be entered for the plaintiff. If otherwise, the judgment to stand.

*R. E. Webster*, for the plaintiff: The law upon this subject is thus summed up in Byles on Bills, 12th ed., 190, 191: "The 1 & 2 Geo. 4, c. 78, s. 2, enacted that no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such \*acceptance be in writing on [138 such bill. This statute, however, does not apply to foreign bills, and does not require the acceptance to be signed. Finally, the 19 & 20 Vict. c. 97, s. 6, enacts that no acceptance of a bill, *inland or foreign*, made after the year 1856, shall charge any person, unless in writing on the bill, and *signed* by the acceptor or some person duly authorized by him. The usual mode of making such an acceptance on the bill was, even before the last-mentioned statute, by writing the word *accepted*, and subscribing the drawee's name. Signature was not essential to a written acceptance within the stat. 1 & 2 Geo. 4, c. 78, but it was a question for the jury whether the acceptance was complete: *Dufaur v. Oxenden* (<sup>2</sup>). But the drawee's name alone written on any part of the bill was a good acceptance: so, without any name, the word 'accepted,' 'presented,' 'seen,' the day of the month, or a direction to another person to pay it: *Anonymous* (<sup>3</sup>); *Powell v. Monnier* (<sup>4</sup>); *Moor v. Withy* (<sup>5</sup>); *Dufaur v. Oxenden* (<sup>6</sup>). In *Armfield v. Allport* (<sup>7</sup>), which was decided after the last-mentioned statute, Pollock, C.B., delivering the judgment of the court, says,—“A man who writes his name across a stamped paper as acceptor, there being a direction to him upon the paper, is liable: he

(<sup>1</sup>) A copy of the judge's notes was appended to the case, as follows:

“25 Oct. 1877. *Hindhaugh v. Blakey*, £20 18s. 8d. Acceptance on bill of exchange.

“The plaintiff examined. Bill produced; consideration stated.

“Cross-examined. I saw defendant sign the bill of exchange by writing his name across it in my office at New-castle:

“*Held*, in accordance with an objection

raised by defendant's solicitor, that the bill was not accepted by the defendant within the meaning of 19 & 20 Vict. c. 97, s. 6, owing to the absence of the word accepted on the bill.

“Judgment for defendant.”

(<sup>2</sup>) 1 M. & Rob., 90.

(<sup>3</sup>) Comb., 401.

(<sup>4</sup>) 1 Atk., 611.

(<sup>5</sup>) B. N. P., 270.

(<sup>6</sup>) 27 L. J. (Ex.), 42.

1878

Hindhaugh v. Blakey.

gives his authority to anybody to draw upon him when it may be convenient to do so, or when the person to whom the paper is given may think it advisable to apply it for this purpose" <sup>(1)</sup>.

[DENMAN, J.: "As acceptor:" but, has any case held that the mere signature of the name, and nothing more, will do?]

There is no such case: but, coupled with the direction of the bill to the drawee, the mere signature ought to be enough to satisfy the statute.

[DENMAN, J.: There can be no doubt that signature is necessary now. The only question is whether "accepted" or some other equivalent word is also required.

GROVE, J.: The acceptance "shall be in writing," and "signed by the acceptor."]

*Meek*, for the defendant: The impression of the learned author of Byles on Bills evidently is that both acceptance [139] and signature \*are necessary since the passing of 19 & 20 Vict. c. 97, s. 6, which enacts that "no acceptance of any bill of exchange, inland or foreign, shall be sufficient to bind or charge any person, unless the same" (that is, the acceptance,) "be in writing on such bill, and signed by the acceptor or some person duly authorized by him." The "acceptance" evidently means a substantive act, something which shall have the effect of calling the party's attention to the nature of the document to which he is attaching his signature.

[DENMAN, J.: Suppose the defendant had written across the bill "All right," and then put his signature to it, would that have been an acceptance within the statute?]

Before 1 & 2 Geo. 4, c. 78, "All right" alone would have sufficed. And now the same words coupled with the signature of the drawee would probably be held enough to charge the party.

GROVE, J.: This case raises an important question, and we will take time to consider it. *Cur. adv. rull.*

March 2. The judgment of the Court (Grove and Denman, JJ.) was delivered by

DENMAN, J.: This was an appeal from a decision of the learned judge of the county court of Northumberland holden at Newcastle.

The action was brought by the plaintiff as drawer against the defendant as acceptor of a bill of exchange; and the question raised upon the case was, "whether the bill was

(1) See *Leslie v. Hastings*, 1 M. & Rob., 119.

sufficiently accepted," the defendant having merely written his name across the face of it, without having used any words amounting to a statement that he accepted the bill.

Before the statute of 1 & 2 Geo. 4, c. 78, s. 2, it was not necessary that a bill should be accepted by any writing upon the bill itself; it was sufficient if in any other document the acceptor used language showing his intention to be bound by the bill as acceptor: *Wynne v. Raikes* (\*) and other cases. It was also sufficient before that statute if the drawee verbally undertook to pay an existing bill: *Lumley v. Palmer* (\*); *Powell v. Monnier* (\*). Disapprobation of the law as it then existed was expressed by very [140] learned judges, see per Lord Kenyon in *Johnson v. Collins* (\*), and per Lord Ellenborough in *Clark v. Cook* (\*); and it was one of the particulars in which the English law was at variance with the law of Scotland.

In the year 1821, it was enacted by 1 & 2 Geo. 4, c. 78, s. 2, "that no acceptance shall be sufficient to charge any person unless such acceptance be in writing on such bill."

Since this statute, it has been laid down by high authority that a mere signature on the face of the bill, without any words of acceptance, may be an acceptance in writing within the statute, Selwyn's *Nisi Prius*, 11th ed., p. 348; Byles on Bills, 12th ed., p. 191; and, on the other hand, that words of acceptance without a signature, if intended as an acceptance, might suffice: *Dufaur v. Ozenden* (\*); see also *Corlett v. Conway* (\*).

By 19 & 20 Vict. c. 97, s. 6, it was enacted "that no acceptance of any bill of exchange shall be sufficient to bind or charge any person, unless the same be in writing on such bill, and signed by the acceptor or some person duly authorized by him."

In the present case it was contended that, inasmuch as before the statute a mere signature would have been a sufficient acceptance in writing within 1 & 2 Geo. 4, c. 78, s. 2, it was not the less so now; and that, inasmuch as it was a signature of the acceptor, the bill was both accepted in writing and signed by the acceptor, within the meaning of the later enactment. But, looking at the history of the law and of the enactments on the subject, we are of opinion that the county court judge was right in holding that the statute had not been complied with.

(\*) 5 East, 514.

(\*) 2 Str., 1000.

(\*) 1 Atk., 613.

(\*) 1 East, 98.

(\*) 4 East, 72.

(\*) 1 M. & Rob., 90, per Patteson, J.

(\*) 5 M. & W., 655, per Parke, B.

1878

Hindhaugh v. Blakey.

It is not for us to speculate upon the object of the Legislature; but, if it were necessary to do so, we think it may well have been intended by the enactment now in question to prevent ignorant persons from being too easily bound by a mere signing of their names; and that it was therefore purposely required that there should be upon the face of the bill some words indicating an intention to be bound by it as acceptor, as well as the mere signature of the party.

[41] \*Comparing the words of the later statute with those of the former, we think it impossible that a mere signature of a name can be held to fulfil the double requirement that the acceptance shall be in writing on the bill, *and* signed by the acceptor. We therefore think that, upon the question submitted to us, the learned county court judge was right.

It appears to us, however, that there is a statement upon the face of the case which makes it at least doubtful whether the judgment for the defendant ought to stand. It is stated in par. 3 of the case "that the plaintiff proved that the bill was given for value." If this means that the plaintiff proved that the defendant received an advance of money from him, or goods, for the value of which the bill was given, it would appear to be a case in which the learned judge had full power to amend the claim and give judgment for the plaintiff, 19 & 20 Vict. c. 108, s. 97: and we do not see any reason why this should not now be done, so far as appears upon the face of the case.

We desire, however, not to be considered as withdrawing this question from the discretion of the county court judge, inasmuch as the case before us having been stated with the view of raising the point of law upon which we have given our decision, he may possibly have stated the facts with regard to proof of value more in favor of the plaintiff than would have been warranted if the learned judge had had the question argued before him.

We think that the case should be remitted to the county court judge, in order that he may reconsider this point, and give judgment for the plaintiff or defendant according as he may think right to act upon this suggestion or not, with reference to the facts actually proved.

*Judgment accordingly.*

Solicitors for plaintiff: *Williamson, Hill & Co.*, for Ingle-dew & Daggett, North Shields.

Solicitor for defendant: *John Scaife*, for Duncan & Duncan, South Shields.

[3 Common Pleas Division, 163.]

Feb. 8, 1878.

[IN THE COURT OF APPEAL.]

\*FRENCH V. NEWGASS.

[163]

*Ship and Shipping—Charterparty—Description of Vessel—Warranty.*

A description in a charterparty that a vessel is of a particular class is not a continuing warranty, but applies only to the classification at the time the charterparty is made.

*Hurst v. Osborne* (18 C. B., 144,) approved of.

APPEAL from the judgment after trial before Denman, J., in favor of the plaintiff, in an action for refusing to load a vessel pursuant to a charterparty.

At the trial at the Liverpool Assizes, 1878, the following facts were proved: The plaintiff was the owner of a vessel called the William Jackson, and he chartered her to the defendant to \*proceed to New Orleans, and there to [164] load as customary from the agents of the charterer a cargo of cotton, and from thence to proceed to Liverpool. The material parts of the charterparty were as follows: "A 1½ Record of American and Foreign Shipping Book. London, 4 Sept., 1876. Charterparty. It is mutually agreed between the owners of the ship William Jackson, newly classed as above, . . . and B. Newgass & Co., merchants, of Liverpool," &c. At the time the charterparty was made the William Jackson was on the register of the American and Foreign Shipping classed as stated in the charterparty. The ship sailed for New Orleans, and arrived there on the 13th of November, 1876, and was ready to receive her cargo from the defendant, and to complete her chartered voyage. On the 25th of November the inspectors of several local and foreign insurance offices and underwriters at New Orleans declared the ship to be unseaworthy, and the classification of the ship (A 1½ Record of American and Foreign Shipping) was cancelled by the American and Foreign Shipping Association. The defendant under the circumstances declined to load the vessel. Judgment was entered for the plaintiff.

*Herschell*, Q.C., and *Butler*, for the defendant: The authorities show that a description of a vessel in a charterparty is a warranty. The case is not similar to *Hurst v. Osborne* ('), where after the warranty the vessel had run off her class, but here the classification was void *ab initio*. The classification having been annulled the charterer is in

(') 18 C. B., 144; 25 L. J. (C.P.), 209.

1878

French v. Newgass.

the same position as if the vessel had never been classed; it is as if the shipowner had offered the charterer an unclassed ship; in that case the charterer would not be bound to load the ship, and to pay a freight equal to that he would have to pay for a classed vessel. The warranty is that the vessel is absolutely and not voidably on the register as A 1½, and will continue so classed for the time that she purports to be so classed, and that she is rightfully on the register according to the classification described in the charterparty. By the act of the shipowner the adventure was frustrated, *Jackson v. Union Marine Insurance Co.* (¹); and the charterer was [165] justified in his refusal to load the vessel. If the charterer is compelled to load the vessel he will have no remedy against the shipowner, although the vessel may have been wrongfully put upon the register, whereas if this action is held not to be maintainable the shipowner will have a remedy against the association if the vessel has been wrongfully taken off the register.

*C. Russell, Q.C.*, and *French*, for the plaintiff, were not called upon.

BRAMWELL, L.J.: I am of opinion that the judgment should be affirmed. I have no doubt that this is a clear case. I should think this statement is a warranty that the vessel is classed A 1½. Mr. Herschell said that it is a warranty that the vessel is so classed, and will continue so classed, till she gets off her class; and he also said that it is a warranty that she is so classed, and rightly so classed. To put these constructions upon the warranty would be unreasonable. If we look at the charterparty the shipowner cannot be made liable in this action. The facts are that the shipowner knew no more of this matter than did the charterer; he did not know the rules of the American and Foreign Shipping Association, or what ships they thought fit to put on or to take off the register. The question is, what is the reasonable expansion of this warranty? It is, I think, that the shipowner warrants that the American and Foreign Shipping Association, having satisfied themselves by such means as they thought fit as to the condition of the ship, have put her on the register, and that she is there as such, but the shipowner does not say that they will not change their minds, and rightly or wrongly take her off. It seems to me impossible to hold that there is an undertaking on the part of the shipowner that the vessel shall continue on the register; that cannot be, because if she were taken off, the shipowner has broken his warranty, and most important

(¹) Law Rep., 10 C. P., 126, 144; 11 Eng. Rep., 290, 307.

questions would arise, for if Mr. Herschell is right, the insurance on the ship would be void, and the insurance on the goods would also be void; the peril, therefore, of holding, as Mr. Herschell wishes us to hold, would be greater than holding the other way. Mr. Herschell's argument also was, that if the court decided against the charterer, and he had to load the vessel, he would have no \*remedy, [166 but that the shipowner would have a remedy against the American and Foreign Shipping Association if his vessel was wrongfully taken off the register. I do not think any action would lie against them; they did not undertake absolutely that they would arrive at a right conclusion as to the condition of a vessel in every case, but only that they would use due diligence to do so. I cannot but think the mischief is great whichever construction is adopted, but it is a misfortune. The charterparty has been entered into upon the supposition that the vessel was on the register classed A 1½, and the warranty is only that she is on the register classed as A 1½ at the time of making the charterparty. It was also said during the argument that the proceedings at New Orleans annulled the classification. The ship was on the register as of the class described, and as a fact that is still true; a fact cannot be annulled. The engagement is "this vessel at the time of the charterparty is on the American and Foreign Shipping Book," that is all. The judgment of the learned judge was right, and the appeal must be dismissed.

BRETT, L.J.: I am of the same opinion. The question is one solely of construction, and whatever hardship there may be, we have only to construe the written instrument, which in its terms is elliptical. The document states "A 1½ Record of American and Foreign Shipping Book." Now, the ordinary meaning of that language is that it refers to the ship, and that she is, at the time of entering into the charterparty, registered as A 1½. The document further speaks of the ship newly classed as above; that relates to what has been done in the book of the American and Foreign Shipping. I am of opinion that the words amount, not only to a warranty, but to a condition, as to the vessel's classification at the time the charterparty was made, and that they must be construed in their grammatical and natural sense; they cannot be added to. No doubt the meaning of words may be extended by custom, if consistent with the written instrument, but here the words are plain, and no addition can be made to them; construing them according to their grammatical meaning, it is a statement as to the

1878

French v. Newgass.

actual registration of the vessel. The only argument that [167] can be urged on behalf of the defendant is \*the argument which was urged in *Hurst v. Usborne* (') unsuccessfully, that it is a continuing warranty, and therefore it must be taken to be a statement that the vessel would continue to be of the same class that she was at the time the charterparty was made. Mr. Herschell proposes to add to the statement; he says that the words are to be construed, not merely that she is newly classed, but that she will continue to be of the same class as she was at the time the charterparty was made; but that construction would refer to the future, whereas the words of the charterparty only refer to the present. If the words suggested were added by implication, the shipowner, no doubt, would have failed to offer a proper ship; but that construction adds to the meaning, and if adopted, the shipowner would have warranted, not only the description of the vessel at the time of the charterparty, but he would have made himself liable for the acts of the authorities at New Orleans, over whom he had no control. It is quite clear that we ought to adhere to the words of the charterparty, and give to them their ordinary meaning. The charterparty contains, as a fact, a statement that the ship is A 1½ Record of American and Foreign Shipping at the time the charterparty was made.

COTTON, L.J.: I am of the same opinion. The defendant relies upon the words "A 1½ Record of American and Foreign Shipping Book." That amounts to a warranty, and what is its meaning? I except the case of fraud; its meaning then comes to no more than this, that at the time the charterparty is made the vessel is A 1½, &c.; not that she will continue so, because that would cover a wrongful act of the American Association, if they wrongfully took the vessel off the register. It was said during the argument, that the classification having been cancelled, it is as if the registration of the vessel has never existed. I cannot accede to that. The ship was on the register, and was taken off, for aught that appears, by the wrongful act of some third party; that cannot make the classification as if it had never existed. What has taken place between the shipowner and the American Association does not render the statement in the charterparty void as against the charterer.

[168] \*I am also of opinion that no terms can be imported into the contract, and that the contention that the warranty

(') 18 C. B. (N.S.), 144; 25 L. J. (C.P.), 209.



is a continuing one cannot be supported, and that the appeal must be dismissed.

*Judgment affirmed.*

Solicitors for plaintiff: *R. Smith, Williams & Quiggin*, Liverpool.

Solicitors for defendants: *Haigh & Sons*, Liverpool.

---

[3 Common Pleas Division, 168.]

March 1, 1878.

[IN THE COURT OF APPEAL.]

**HURDMAN V. THE NORTH EASTERN RAILWAY COMPANY.**

*Action for Injury caused to an Adjoining Occupier—Owner of Land, Duty of—Negligence—Water, Percolation of.*

A statement of claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage:

*Held*, upon demurrer, that the statement of claim disclosed a good cause of action.

APPEAL from the judgment of Manisty, J., in favor of the plaintiff on demurrer to a statement of claim.

Claim: At the time of the damage hereafter mentioned the plaintiff was, and is still, possessed of a house, No. 16 Lodge Terrace, Sunderland.

2. The defendants then were, and still are, possessed of a certain close of land adjoining the house of the plaintiff.

3. The defendants placed and deposited in and upon the close of the defendants, and upon and against a wall of the defendants which adjoins and abuts against the house of the plaintiff, large quantities of soil, clay, limestone, and other refuse, close to and adjoining the house of the plaintiff, and thereby raised the surface of the defendants' land above the level of the land upon which the plaintiff's house was built.

4. The rain which fell upon the soil, clay, limestone, and other refuse so placed as aforesaid oozed and percolated through the wall of the defendants into the house of the plaintiff, and the plaintiff's house thereby became [169] wet, damp, unwholesome and unhealthy, and less commodious for habitation.

5. By reason of the acts of the defendants the walls of the house of the plaintiff became and were very much injured, and the paper upon the walls has been destroyed.

6. In the alternative the plaintiff alleges that the defendants negligently and improperly placed and deposited the

1878

Hurdman v. North Eastern Railway Co.

soil, clay, limestone, and refuse upon the defendants' land, and that the rain water falling thereon oozed and percolated through and into the plaintiff's house, whereby the plaintiff's house was damaged as before mentioned.

7. In the alternative the plaintiff alleges that the defendants were guilty of negligence in this, that the wall of the defendants against which the defendants so placed the soil, clay, limestone, and refuse was not sufficiently and properly constructed and built so as to prevent the water falling upon the soil, clay, limestone, and refuse from oozing and percolating through the wall and into the plaintiff's house, and that the defendants were guilty of negligence in placing the soil, clay, limestone, and refuse against the wall being so insufficient to prevent the water falling upon the soil, clay, limestone, and refuse from oozing and percolating through and into the plaintiff's house, whereby the plaintiff's house was damaged.

Demurrer to the claim, on the ground that the acts, matters, and things alleged to have been done by the defendants do not give rise to any right of action on the part of the plaintiff.

Feb. 8, 9. *Herschell*, Q.C., and *G. Bruce*, for the defendants in support of the demurrer: The statement of claim discloses no cause of action. The plaintiff's complaint is that the defendants have raised the soil of their own land, within their own boundary wall; that the plaintiff has built his house against the defendants' wall, and that the rain falling on the defendants' soil so raised oozes through the defendants' wall and runs on to the plaintiff's land and causes damp to his house. The question then is, what duty is there on the defendants not to do the acts, on their own land, of which the plaintiff complains. This is not a case where filth, or water has been collected in an artificial reservoir and then let loose, but the alleged injury is [170] caused by the natural \*rain-fall percolating into the plaintiff's land. The claim is first set out without negligence, and then it alleges negligence, but in no way can the plaintiff impose a duty on the defendants, not even by alleging negligence. The plaintiff is seeking to put a limitation on an owner as to the manner in which he shall use his land. *Fletcher v. Rylands* (\*) has no application; the case most analogous to the present is *Wilson v. Waddell* (\*). There the plaintiff and defendant owned coal mines under their respective land. The coal in the defendant's mine

(\*) Law Rep., 3 H. L. C., 330.

(\*) 2 App. Cas., 95.

cropped out to the surface of the defendant's land, and as each had worked out his mine there was a free communication under ground between the land of the plaintiff and the defendant. By reason of the minerals being near the surface in the defendant's mine, the surface sunk, making large fissures, so that the rain, which before had fallen on an impervious bed of clay forming a water-tight roof over the land, made its way into the fissures and so fell through into the defendant's mine and then ran down into the plaintiff's mine. The plaintiff's contention was that the defendant had interfered with the natural condition of the surface of his land, which by its natural drainage carried off the water, and had thereby let the water come down into the plaintiff's mine and injured him. The House of Lords held that as the rain which fell upon the land had merely percolated and gravitated in a different way from that in which it would if the surface had been left unchanged, the plaintiff had no right of action; that the defendant had a right to use his land as he pleased, and that a servitude to prevent such an user must be founded on something more than mere neighborhood. If the defendants had made a defined flow of water into their neighbor's land that might give a cause of action, but the distinction is that where water flows on to the adjoining land merely by natural gravitation there is no cause of action. *Baird v. Williamson* (\*), *Smith v. Fletcher* (\*), and *Crompton v. Lea* (\*), are cases of the diversion of streams running in defined channels. Even if water was artificially collected and escaped by *vis major* so as to injure an adjoining owner, no compensation can be obtained for the injury: *Nicholls v. Marsland* (\*). [171] *Broder v. Saillard* (\*) is not an authority against the defendants, although it may contain some dicta which are adverse to them.

In paragraph 6 the word "negligently" is used, but unless a duty is shown to exist the breach of which gives a cause of action, the mere use of the word "negligently" carries the case no further. The defendants had a right to put the soil on their own land; it is difficult to understand how a man can do a thing negligently on his own land, but even assuming it was negligently done, that will not avail the plaintiff; the mere allegation that the act was done neg-

(\*) 15 C. B. (N.S.), 376; 33 L. J. (C.P.), 101.

(\*) Law Rep., 19 Eq., at p. 126; 11 Eng. Rep., 729.

(\*) Law Rep., 9 Ex., 64; 8 Eng. R., 510.

(\*) Law Rep., 10 Ex., 255; 14 Eng. Rep., 538.

(\*) 2 Ch. D., 692; 17 Eng. Rep., 693.

1878

Hurdman v. North Eastern Railway Co.

ligently is not sufficient: *Gautret v. Egerton* ('); *Brine v. Great Western Ry. Co.* ('). Neither does paragraph 7 show any cause of action; in that paragraph the plaintiff complains that the defendants were guilty of negligence in not building a wall on their own land, of sufficient thickness to keep the water which falls on the defendants' land from percolating into the plaintiff's land. No such duty can be imposed on the defendants.

Feb. 11. *Waddy, Q.C., and John Edge*, for the plaintiff, contra: Paragraphs 6 and 7 disclose a good cause of action. *Gautret v. Egerton* (') has no application. The principle on which that case was decided is, that where a man comes on to another's land without invitation and he is injured he has no cause of action. *Wilson v. Waddell* ('), chiefly relied on for the defendants is also inapplicable. The question there decided was that the right to work mines is a right of property which when duly exercised begets no responsibility. The defendant in that case was making a natural use of his land which caused the subsidence; but in the present case the raising of the surface in the defendants' land was an artificial erection, and if in consequence more water than was wont flows into the adjoining land and causes an injury an action lies. The cases cited on behalf of the defendants relate to mining, and the principle on which they rest is explained in *Crompton v. Lea* ('). It is there said, "The party [72] \*who has got the mine in the dip must take the risk of the water flowing when the mining operation is going on in a regular way. Every one has a right to use his land or his mine and make the most of it, subject ordinarily to the rule that he must use his property so as not to injure his neighbor. Ordinarily he is bound to take care that nothing wanders from his property on to his neighbor's so as to injure him. But in applying that qualification of the ordinary rule it is well settled that the case of underground water flowing from ordinary and proper mining operations does not come within it, and therefore the lower proprietor must take subject to the risk. That is what cases like *Smith v. Kendrick* (') decide. On the other hand, *Baird v. Williamson* (') is an example of a case of a different kind, where it is said, 'If you do work you must only work in the ordinary proper and skilful way, and must not accumulate a

(') Law Rep., 2 C. P., at p. 374.

(2) 2 B. & S., 402.

(3) Law Rep., 2 C. P., 371.

(4) 2 Ap. Cas., 95.

(5) Law Rep., 19 Eq., at p. 126; 11 Eng. R., 729.

(6) 7 C. B., 515; 18 L. J. (C.P.), 172.

(7) 15 C. B. (N.S.), 376; 33 L. J. (C.P.),

mass of water, and then throw that water in a mass on the proprietor whose mine is lower down.' . . . In respect of that an action will lie." The case which most nearly resembles the present is *Broder v. Saillard* <sup>(1)</sup>, and is an authority in favor of the plaintiff. There the plaintiff and defendant were adjoining occupiers; the defendant's stable was erected on a mound of made earth, which caused the damp to percolate through the wall of the plaintiff's house, and it was decided that in whatever way water, whether from rain or otherwise, is caused to flow on to a neighbor's land by means of an artificial work, the owner may maintain an action for any injury sustained by him. *Acton v. Blundell* <sup>(2)</sup> and *Chasemore v. Richards* <sup>(3)</sup> are cases relating to the flow of water underground, and are governed by a rule of law which has no application to the present case.

*Herschell*, Q.C., in reply.

*Cur. adv. vult.*

March 1. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

COTTON, L.J.: In this case the plaintiff has brought an action \*for injury alleged to have been caused to his [173 house, which abuts on a wall of the defendants, by certain acts done by the defendants on their own land. The question is raised on demurrer to the statement of claim, and the question therefore is whether that alleges a good cause of action. [The Lord Justice read the statement of claim, except paragraph 7.] It is unnecessary to read the seventh paragraph, because it is based on a supposed obligation of the railway company to make their wall water-tight, but in our opinion there is no such obligation, and if the statements contained in the preceding paragraphs do not show a cause of action, the statements of the seventh paragraph do not enable the plaintiff to sustain this action.

For the purposes of our decision, we must assume that the plaintiff has sustained substantial damage, and we must construe the statement as alleging that the surface of the defendants' land has been raised by earth and rubbish placed thereon, and that the consequence of this is that rain water falling on the defendants' land has made its way through the defendants' wall into the house of the plaintiff, and has caused the injury complained of. The question is, are the defendants, admitting this statement to be true, liable to the plaintiff? and we are of opinion that they are. The heap or mound on the defendants' land must, in our

<sup>(1)</sup> 2 Ch. D., 692; 17 Eng. R., 693. <sup>(2)</sup> 12 M. & W., 324. <sup>(3)</sup> 7 H. L. C., 349.

1878

Hurdman v. North Eastern Railway Co.

opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against any one who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if any one by artificial erection on his own land causes water, even though arising from natural rain fall only, to pass into his neighbor's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured, and this view agrees with the opinion expressed by the Master of the Rolls in the case of *Broder v. Saillard* <sup>(1)</sup>. I have limited this statement of liability to liability for allowing things in themselves offensive to pass [174] into a neighbor's property, \*and for causing by artificial means things in themselves inoffensive to pass into a neighbor's property to the prejudice of his enjoyment thereof, because there are many things which when done on a man's own land (as building so as to interfere with the prospect, or so as to obstruct lights not ancient) are not actionable, even though they interfere with a neighbor's enjoyment of his property. But it is urged that this is at variance with the decision that if, in consequence of a mine owner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the deep, the latter mine owner cannot maintain any action for the loss which he thereby sustained. But excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbor of his land, and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled), is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbor of his land. That this is the principle of these cases appears from the case of *Wilson v. Waddell* <sup>(2)</sup>, and from what is said by the Lord Chancellor in *Fletcher v. Rylands* <sup>(3)</sup>. Moreover, the cases referred to

(1) 2 Ch. D., at p. 700, 17 Eng. R., 700.

(2) 2 Ap. Cas., 95.

(3) Law Rep., 3 H. L. C., 330.

have laid down that a mine owner is exempt from liability, for water which in consequence of his works flows by gravitation into an adjoining mine, only if his works are carried on with skill and in the usual manner; and in the present case it is stated that the defendants have conducted this operation negligently and improperly. The decisions, therefore, as regards the rights of adjoining mine owners, do not enable the defendants to discharge themselves from liability.

It was also argued that a land owner, who by operations on his own land drains the water percolating under ground in the property of his neighbor, is not liable to an action by the man whose land is thus deprived of its natural moisture, and this it was argued \*was inconsistent [175 with a judgment for the plaintiff on a statement alleging as a cause of action an alteration in the percolation of water. It is sufficient to say that no one can maintain an action unless there is some injury to something to which the law recognizes his title, and the law does not recognize any title in a land owner to water percolating through his property under ground and in no definite channel.

We are of opinion that the maxim "*sic utere tuo ut alienum non lœdas*" applies to and governs the present case, and that as the plaintiff by his statement of claim alleges that the defendants have by artificial erections on their land caused water to flow into the plaintiff's land, in a manner in which it would not but for such erection have done, the defendants are answerable for the injury caused thereby to the plaintiff.

*Judgment affirmed.*

Solicitors for plaintiff: *Wright & Pilley*, for Tilley, Sunderland.

Solicitors for defendants: *Williamson, Hill & Co.*, for Richardson, Gutch & Co., York.

---

See Moak's Underhill on Torts, 457-478; 26 Eng. Rep., 300 note.

In respect to the running off of surface water caused by rain or snow, an owner of land is not prevented from filling up wet and marshy places on his own soil, for its improvement and his own advantage, because his neighbor's land is so situated as to be incommoded by it; nor because by so doing he prevents the water reaching a natural watercourse as it formerly did: *Barkley v. Wilcox*, 13 N. Y. Weekly Dig., 173; 24 Alb. L. J., 453, affirming 9 N. Y. Weekly Dig., 298, 19 Hun, 320.

Where the situation of two adjoining fields is such that the surface water from rains and melting snows flows naturally from one field upon the other, the owner of the upper field may not construct drains or trenches so as to concentrate the flow of water upon the lower field and increase the wash upon the land.

The right of the owner of the upper field to make drains on his own land is restricted to such as are required by good husbandry and the proper improvement of the surface of the ground, and as may be discharged into natural

1878

Hurdman v. North Eastern Railway Co.

channels without inflicting palpable and unnecessary injury on a lower field of an adjacent owner: *Templeton v. Vosleloe*, 72 Ind., 134.

The owner of land may, upon the boundaries thereof, not interfering with any natural or prescriptive watercourse, erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he is not responsible; but such waters as fall in rain and snow upon his lands, he must keep within his boundaries or permit them to flow off without artificial interference, unless within the limits of his own land he can turn them into a natural watercourse: *Cairo, etc., v. Stevens*, 73 Ind., 278.

A city caused open paved gutters to be constructed on the side of a street, and similar gutters to be constructed on other streets leading into it. At the end of the gutters, on the principal streets, were underground drains leading into a culvert, through which flowed a natural watercourse. In consequence of this construction, quantities of sand and filth were carried into the watercourse, causing it to overflow upon the plaintiff's land below the culvert, and obstructing the passage of water from a drain which ran from plaintiff's house to the watercourse. Held, that if the city had diverted the water from its natural course, and had accumulated it in such quantities as to create a private nuisance to the plaintiff, he could maintain an action of tort against the city for the injury caused thereby: *Manning v. Lowell*, 130 Mass., 21.

Where a city, in grading its streets, by cutting ditches and drains, collects surface water and casts it in a body upon the lot or ground of the proprietor below, unless it is so cast into a natural watercourse, the proprietor sustains a legal injury, and may recover in an action therefor.

It is the duty of a city, in making improvements upon the streets, to use such skill that the improvements so made shall not change the course of the surface water in such manner as to materially injure the property adjoining thereto: *Gillison v. Charleston*, 16 W. Va., 282.

When persons owning lands, through which runs a stream, permit and participate in the use thereof as a sewer, they cannot enjoin a similar use by others, if reasonable under the circumstance, and no actual nuisance is thereby created. They must be held to have waived their natural right to purity in the stream. Merely increasing the flow of water in a natural watercourse does not, like increasing the flow of surface water, give a right of action. Riparian owners cannot complain when such increase is due to the building or change of grade of streets, and the improvement of lots fairly within the territory drained by such watercourse, when its capacity is not exceeded.

A watercourse in a city is, within its capacity, likewise bound to receive such increased drainage as is due to the increase of population along it, including such of the drainage due to human habitation as is usually led into street gutters.

No right of riparian owners is invaded when the flow is increased, if not beyond the stream's capacity, by changing the grades of lots to make them conform to the grades of streets upon which they abut, although surface water is thereby thrown into the stream which naturally would not flow: *Kemper v. The Widows' Home*, 9 Am. Law Rec., 731.

The statute, relating to the draining of lands in 1853 (Rev. Stat., tit. 47), does not authorize the county court to empower the owners of lands to drain them in such a manner that the water will be discharged from them, and be deposited, and remain, on the land of adjoining proprietors, but only to drain them *across* such adjoining lands: *French v. White*, 24 Conn., 170.

A railroad company, in consideration of the grant of a right of way for its road through the lands of the plaintiff and of two other adjoining proprietors, agreed to make such culverts and crossings as might be necessary to enable the parties "to reasonably occupy their lands to carry off surplus water," etc., and that upon the hillside of said road a sufficient drain should be made and kept open "for the discharge of the drainage." The company built a culvert across its road south of and below said lands, with which the drain on the hillside of the road was con-



nected, and through which the drainage from the lands of the plaintiff was discharged.

Held, that the culverts and the drain form necessary parts of the plan or means agreed on for draining the lands of the plaintiff on the hillside of the railroad, and that for damages caused to such lands by the obstruction of the drain the company is liable, although the obstruction may not have been on the lands of either of the parties granting the right of way: *Madden v. Railway Co.*, 36 Ohio St. Rep., 46.

The breaking of a culvert under the embankment of defendant's road, in a freshet, having caused an accumulation of water, which, the embankment being opened, overflowed plaintiff's land to his damage, the circuit judge charged the jury that if the servants of the defendant let off the water, the defendant was liable for the actual damage therefrom ensuing to the plaintiff, no matter how much care and caution they exercised. Held, erroneous, and that the defendant was not liable unless guilty of negligence in setting free the accumulated water: *Mills v. Gt. & C. R. R. Co.*, 13 S. C., 97.

A railroad company, whose road was built upon a right of way granted to the company by the proprietor for that purpose, so constructed its roadbed and ditches as to collect and discharge water upon adjacent lands of the latter. In an action against the company to recover for the damages thus sustained, the evidence was conflicting as to whether the water was that of a running stream or natural watercourse, or whether it was simply surface water. The trial court, after instructing the jury as to what constitutes surface water, and what a stream or watercourse, further instructed them in substance as follows:

1. That if the water was surface water the company was not liable, provided its roadbed and ditches were constructed with reasonable care and skill with reference to the use of the same for railroad purposes. The company was not bound to make ditches to protect plaintiff's land from injury from surface water.

2. But if the water was that of a stream or natural watercourse, and it was diverted from its natural channel, the company was liable: provided,

however, that plaintiff could not recover for damages which he might have averted at comparatively small cost.

The company was bound to make sufficient ditches and passages to conduct the water away, and prevent it from injuring plaintiff; but if it did not do so, it was the duty of plaintiff to use all reasonable means to avert and avoid injury by the construction of ditches and levees himself within a reasonable time, if the same could be done at a reasonable amount of labor and expense. On appeal by the company from a verdict and judgment for plaintiff:

Held, that the company had no right to complain of these instructions: *Munkers v. The Kansas, etc.*, 72 Mo., 514.

If a municipal corporation in changing the grade, by raising or depressing its streets, permanently damages private property without acquiring the right to do so, and if demanded, by paying just compensation therefor, it violates section 9 of the bill of rights, which declares that private property shall not be taken or damaged for public use without just compensation.

The first clause of section 9 of the bill of rights, *ex proprio rigore*, protects private property from damage for public use without just compensation.

Where the constitution forbids a damage to private property and points out no remedy, and no statute gives a remedy for the invasion of the right of property thus secured, the common law, which gives a remedy for every wrong, will furnish the appropriate action for the redress of such grievances: *Johnson v. Parkersburg*, 16 W. Va., 402.

The defendant claimed that the city had, before the injury, by legal proceedings, taken the entire brook for a public sewer, and that the channel within his own premises had, under those proceedings, passed out of his control and into that of the city. The plaintiff claimed that the proceedings were not regular and complete, and had not vested a legal right to the sewer in the city. Held, that the question was whether the city had in fact taken possession and control of the channel for a sewer, the defendant being liable for the continuance of the nuisance, without reference to the

legal proceedings, so long as the actual possession and control had not passed from him to the city: *Sellick v. Hall*, 47 Conn., 260.

Where different parties pollute a stream by the discharge of sewerage therein, each from his own premises, and each acting separately and independently of the others, one of the number is not liable for all the injury suffered by another, because of the nuisance thus created: each is liable only to the extent of the wrong committed by him. The authorities holding, that where a direct personal injury is occasioned by the separate and concurring negligence of two or more parties, an action against one or all will lie, and those holding that an equitable action will lie to restrain parties who are severally contributing to a nuisance, distinguished: *Chipman v. Palmer*, 77 N. Y., 51.

Where two or more parties act each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other.

The owner of upper land, who has for more than five years enjoyed the privilege of running the waste water used, from artificial sources, for the purpose of irrigating his land, does not acquire an easement to run the same over the lower lands in such unreasonable or unnatural quantities as to damage the property of such lower landowners, and an injunction will issue to prevent such injury, although the parties enjoined are not jointly liable for the damages: *Blaisdell v. Stephens*, 14 Nev., 17; S. C., 33 Am. Rep., 523, 526 note.

The defendant had constructed a covered channel for a small brook that

ran through his premises in the city of N. This channel proved insufficient for the flow of all the water that came down the brook in times of heavy rain, and by its obstruction caused the water to overflow upon and injure the adjoining premises of the plaintiff. The city, since the defendant's channel was made, had constructed several sewers and drains which emptied into the brook above his premises, by which a considerable quantity of sewage, and of surface water that it was claimed would have gone in other directions, was let into the brook. In a suit for the damage to the plaintiff's property it was held:

1. That the defendant was not liable for any damage beyond that caused by the natural flow of the water, including its increased flow from heavy rains and other ordinary natural causes.

2. That it was no reason for holding the defendant liable for more than this, that the proportion of the damage done by the overflow of the natural water of the brook was difficult of ascertainment: *Sellick v. Hall*, 47 Conn., 260.

In an action for damages to a house by excavations in the street, it appeared that a part of the work of excavating was done by the defendant, and a part by others, but the verdict against the defendant was for the entire damage, partly caused by others. There was no such exception taken by the defendant as raised the question of the admissibility of this evidence or its submission to the jury. The judgment on such verdict was therefore affirmed on appeal, but an order denying a new trial reversed, on the ground that the verdict was against evidence: *Burns v. Dillon*, 12 N. Y. Week. Dig., 473.

[3 Common Pleas Division, 175.]

Jan. 25, 1878.

**BATH, Appellant; WHITE, Respondent.**

*Licensing Act, 1872, 35 & 36 Vict. c. 94, s. 5—Sale of Beer by a Person not licensed to sell the same to be drunk on the Premises.*

The defendant, a person licensed to sell beer not to be drunk on the premises, sold beer to Y., who brought a jug for it and carried it across the highway to the cottage of one S., about fourteen yards from the defendant's premises, and handed the jug to S., who was standing in his own garden. S., having drunk some of the beer, returned the jug over the wall to Y. and others, who also drank of it standing on the pathway close to the wall. The jug was refilled two or three times, and the beer drunk in the same way. The defendant received the money for the beer on each occasion, and saw or might have seen what was going on:

*Held*, that this evidence did not justify a conviction of the defendant under 35 & 36 Vict. c. 94, s. 5, for permitting drinking "on the premises where the beer was sold, or on any highway adjoining or near such premises, with the privity or consent of the seller."

CASE stated by justices for the county of Wilts under 20 & 21 Vict. c. 43.

An information, under s. 5 of the Licensing Act, 1872, was \*preferred by the respondent against the appellant, [176 charging that J. Sawyer and I. York did purchase certain intoxicating liquor, to wit, two quarts of beer, from E. Bath (the appellant), beerhouse keeper, who was not then licensed to sell the same to be drunk on the premises, and did unlawfully drink the said liquor on a certain highway adjoining or near such licensed premises, with the privity of the appellant, was heard and the appellant convicted.

The facts deposed to were as follows. The appellant held a license to sell beer to be drunk off the premises, and was not a licensed victualler. On the 1st of September, 1877, about two o'clock in the afternoon, a police constable saw the appellant with two men named Sawyer and Clark standing outside the appellant's front door. Sawyer was sent to fetch a jug from a cottage near, which he took inside the house, and shortly after came out with it filled with liquor, which he took to the opposite side of the road and commenced drinking in company with several other persons. The witness then went over and asked to partake of the liquor. He drank some, and found it was beer. Close to the spot where Sawyer and the others were standing was a wall which divides the public footpath from the garden of a man named George Sheppard. The beer was handed over the wall to Sheppard. The space between the front of the appellant's house and Sheppard's wall is the public high-

1878

Bath v. White.

way leading from Melksham to Bath, through the village of Atworth. The width of the road and footpath was about ten yards. Sheppard and his wife partook of the beer over their garden wall, and did not leave their premises. Sawyer, a man named York, Clark, and Cottell, and several others, remained on the footpath drinking. During the whole time the witness was present, the appellant remained outside her house about three or four yards into the road looking at the men on the opposite side and passing remarks to the witness. When the jug was empty, it was taken by York to the appellant standing at her front door. He asked her for another quart, and he (witness) heard her say to York, "Who is going to pay for it?" The appellant's servant Elizabeth Watts took the jug inside, and brought it back again full of liquor, and handed it to York, who drank from it. When Elizabeth Watts handed the jug to York, he gave the appellant something which he (the witness) believed to be money. After waiting about twenty minutes, the witness left, and when he left the men were still drinking on the pavement, and the appellant was still standing outside her house.

In cross-examination the witness further stated, that the jug was not fetched from Sheppard's wall; that the men did not drink until they got over the gutter on the other side of the road; that the appellant did not enter her house the whole time he was there, but remained outside; that, when the jug was filled the second time, York drank out of it almost in the centre of the highway.

This was all the evidence tendered on the part of the respondent; and it was contended on behalf of the appellant,—1. That, upon the facts stated, no offence was committed within the meaning of the 5th section of the Licensing Act, 1872; and three witnesses were called, viz., George Sheppard, Isaac York, and Elizabeth Watts.

Sheppard stated that, on the 1st of September, he handed York a jug from his own house, and gave him money with directions what to do with it; that at the time he did so, he was in his own garden, which is opposite the appellant's house; that, according to his directions, he saw York go with the jug to the appellant's house, and afterwards he brought the jug filled with beer to him; that he watched York the whole time, and was certain he did not drink any of the beer in the road before handing the jug to him over his wall into his garden; that he (the witness) drank some of the beer, and invited several friends who were present to drink some; that York afterwards had the jug refilled at his

own expense, that the appellant had no control over any of their actions, and did not carry on a conversation with any of the party. On cross-examination, the witness stated that he saw Elizabeth Watts once or twice, but did not see her do anything; that the drinking occupied about half an hour; that the main part of the beer was drunk in the garden; and that Sawyer and York stood on the pavement outside his garden when they drank.

York stated that Sheppard gave him a jug and the money to pay for the beer; that he went across to Mrs. Bath's for the beer; that it was drawn for him by Elizabeth Watts, and paid for over the counter; that Sheppard was standing in his own garden about \*fourteen yards from the ap- [178  
pellant's door; that he (the witness) gave the beer to Sheppard, who drank first; that Sheppard handed the jug back over the wall, and asked him to drink; that he (the witness) drank close to the wall of the garden; that the appellant was not there; that he did not see her till he fetched the other quart; that Elizabeth Watts drew the beer, and he (the witness) paid for it, and also for two ounces of tobacco; that he took it to Sheppard; that he did not tell the appellant where he was going to take it; and that she was then in the parlor at the back of the shop, and could not see Sheppard's premises.

This evidence was corroborated by Elizabeth Watts, assistant to the appellant.

The appellant herself was not called.

The justices being of opinion that, upon the evidence before them, the intoxicating liquor was purchased by Sawyer and York from the appellant or from her servant Elizabeth Watts, and was drunk upon the highway upon adjoining or near the appellant's premises, and that such drinking was with the privity of the appellant within the intent and meaning of the 5th section of the Licensing Act, 1872, gave their determination against the appellant as before stated.

*Finlay*, for the appellant: There was no reasonable evidence to warrant this conviction. The question turns upon sect. 5 of the Licensing Act, 1872 (35 & 36 Vict. c. 94) (1).

(1) 35 & 36 Vict. c. 94, s. 5, enacts that, "if any purchaser of any intoxicating liquor from a person who is not licensed to sell the same to be drunk on the premises, drinks such liquor on the premises where the same is sold, or on any highway adjoining or near such premises, the seller of such liquor shall, if it shall appear that such drinking was with his

privity or consent," be liable to certain penalties; and that, "for the purposes of this section, the expression 'premises where the same is sold' shall include any premises adjoining or near the premises where the liquor is sold, if belonging to the seller of the liquor or under his control, or used by his permission."

1878

Bath v. White.

This section was probably framed to meet the difficulty which arose in *Deal v. Schofield* <sup>(1)</sup>. The defendant there was a person licensed to sell beer not to be drunk on the premises: his servant handed beer in a mug of the defendant's through an open window of the defendant's premises [79] to a person who, after paying for it, drank \*it immediately standing on the highway as close as possible to the window: and it was held that this evidence did not justify a conviction of the defendant under 3 & 4 Vict. c. 61, s. 13 <sup>(2)</sup>, for "selling beer to be consumed on the premises where sold." The facts in the present case show that the appellant had committed no offence. She could exercise no control over those who consumed the beer; and, even if they had been guilty of an infraction of the law, there is no evidence that it was done with her privy or consent. The beer on each occasion was consumed by Sheppard and his friends, they being either in his garden or upon the foot-path immediately against his wall, which was about fourteen yards from the appellant's premises. It can make no difference that the person who fetched the beer on one of those occasions may have tasted it whilst crossing the highway.

No counsel appeared for the respondent.

LINDLEY, J.: I have come to the conclusion that the conviction in this case ought to be reversed, on the ground that there was no reasonable evidence that there was a sale of the beer by the appellant "to be drunk on her premises, or on any highway adjoining or near to such premises, with her privy or consent." She had a perfect right to sell beer to be carried to Sheppard's cottage, and she is not to be held responsible for what he did with it. Instead of inviting his friends into his garden to drink the beer, he thought fit to hand it to them over the wall. If the magistrates proceeded upon the ground that the appellant knew that the beer was to be drunk upon the highway adjoining her premises, I think there is no evidence to support their conviction. The word "knowledge" is not used in the act. The first transaction was clearly a *bona fide* sale of the beer to be consumed off the premises; and the subsequent transactions were a mere continuation of the first. If the evidence had clearly shown that the appellant was conniving at the drinking on the highway near her premises,

<sup>(1)</sup> Law Rep., 3 Q. B., 8.

<sup>(2)</sup> 3 & 4 Vict. c. 61, s. 13, enacted that, "if any person shall sell beer, &c., to be consumed in or upon the house or premises where sold, without being duly

licensed so to do, such person shall, in addition to any excise penalty to which he may thereby become subject, forfeit £5," &c

the conviction might have been sustained. But I am by no means satisfied that it does so. There is nothing to show \*that she knew what was to be done with the beer. [180 If it could have been shown that she knew it was to be drunk on the highway "near to or adjoining her premises," and wilfully shut her eyes to the fact, then it might be said to have been done "with her privity or consent," and a conviction might have been sustained. But the facts disclosed upon this case clearly do not warrant the conclusion.

LOPES, J.: Having regard to the whole of the facts laid before us, I do not think there is any reasonable evidence of a violation of the act by the appellant.

*Conviction quashed.*

Solicitor for appellant: *T. H. Harwood*, for J. G. Wilton, Bath.

[3 Common Pleas Division, 184.]

March 8, 1878.

\*WISEMAN V. BOOKER.

[184

*Railway Company—Fencing Land taken for the Railway from the adjoining Lands not taken—8 & 9 Vict. c. 20, s. 68.*

A railway company let surplus land to a tenant, separating it from the adjoining land not taken by means of an open post-and-rail fence four feet high. The tenant planted his land with vegetables. Horses kept on the adjoining land of the defendant, by reason of the insufficiency of the fence passed their heads through and over it and did damage to the tenant's crops:

*Held*, that, the duty of fencing being by 8 & 9 Vict. c. 20, s. 68, imposed upon the railway company, the defendant was not responsible to their tenant for the trespass of his cattle.

APPEAL from a judgment of the county court of Kent holden at Gravesend.

The plaintiff claimed £7 14s. 4d. as damages sustained by him in consequence of two horses of the defendant having eaten vegetables of the plaintiff growing upon a piece of land at Northfleet, the property of the South Eastern Railway Company and let by them as after mentioned. At the trial the following facts were proved or admitted:

The South Eastern Railway Company some years since, under \*the powers of their special acts, incorporat- [185 ing the Companies Clauses, the Lands Clauses, and the Railways Clauses Consolidation Acts, 1845<sup>(1)</sup>, took the piece of land in question and other lands for the purpose of constructing their railway by cutting through such

<sup>(1)</sup> 8 & 9 Vict. cc. 16, 18, 20.

1878

Wiseman v. Booker.

lands; and, after the railway was constructed, the piece of land in question, which is a narrow strip situate at the top of and running along the side of the cutting, which was not needed for the purposes of the railway, was separated by an open post-and-rail fence four feet high from the adjoining land in the occupation of the defendant; and at the commencement and during the continuance of the grievances complained of by the plaintiff, this open post-and-rail fence was the only fence between the adjoining land in the occupation of the defendant and the railway and piece of land in question.

The railway company not requiring to use the piece of land in question let it to the plaintiff's father, who planted it with vegetables. The plaintiff bought the growing crops from his father.

From August, 1875, to May, 1876, the defendant turned out two horses to graze on the land adjoining the company's land, and the horses by putting their heads over or through the post-and-rail fence ate divers of the vegetables of the plaintiff, to the agreed value of £5 1s.

The defendant contended that the railway company, under s. 10 of the Railways Clauses Act, 1845<sup>(1)</sup>, were bound, for the accommodation of the defendant, being the occupier of the adjoining land, to supply and maintain sufficient posts, rails, &c., or other fences for separating the [186] piece of land in question from \*the defendant's land adjoining not taken by the company, and preventing the cattle of the defendant, the occupier of the adjoining land, from straying out of the adjoining land into the land let by the company as above mentioned; and that the open post-and-rail fence four feet high placed by the company between the piece of land in question and the adjoining land occupied by the defendant was not a sufficient fence for that purpose, since the defendant's horses were not thereby prevented from putting their heads over or through the fence and eating the crop of vegetables of the plaintiff; and that the plaintiff stood in the same position as if the crop of

(1) By s. 68 of the Railways Clauses Consolidation Act, 1845, it is, amongst other things, enacted that, "The company shall make and at all times thereafter maintain for the accommodation of the owners and occupiers of lands adjoining the railway, sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such land from

trespass or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands and not towards the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require; and the said other works as soon as conveniently may be."



vegetables had been the property of the railway company, and therefore that the defendant was entitled to judgment.

The judge decided that, if material as between the plaintiff and defendant in the present action, the obligation cast upon the railway company by 8 & 9 Vict. c. 20, s. 68, to supply and maintain sufficient posts, rails, or other fences, &c., did not apply to the case of cattle putting their heads over or through such fences and eating the crops on such last mentioned land; and that the doing so was not "straying on to such last mentioned land" within the meaning of the enactment. The defendant, therefore, in the opinion of the judge, being under the circumstances bound at common law to keep his horses from injuring the plaintiff's crops, he gave judgment for the plaintiff.

The questions for the opinion of the court were,—first, whether or not the company were bound, for the accommodation of the defendant, the occupier of the adjoining land, to supply a fence of sufficient height and thickness to prevent the defendant's horses putting their heads over or through the same and eating the crop of vegetables growing on the land taken for the purposes of the railway,—secondly, if they were so bound, whether their not having done so was or was not a good defence to the action brought by the plaintiff, who, though not the tenant of the piece of land in question belonging to the railway company, was the purchaser of the crops growing thereon,—thirdly, whether under the circumstances stated, if the 8 & 9 Vict. c. 20, s. 68, was inapplicable, the defendant was bound to prevent his horses eating the plaintiff's crops.

\**Tenant*, for the defendant: The duty of fencing so as to separate the land taken for the use of the railway from the adjoining lands not taken, and preventing the cattle of such adjoining owners from straying thereout, being by s. 68 of 8 & 9 Vict. c. 20, cast upon the railway company under whom the plaintiff claims, the defendant cannot be responsible for damage caused to the plaintiff through the insufficiency of such fences: see *Ricketts v. East and West India Docks and Ry. Co.* (1); *Manchester, Sheffield and Lincolnshire Ry. Co. v. Wallis* (2). [*Wilson v. Newberry* (3), where the plaintiff's horses were poisoned by eating clippings from yew trees growing on the defendant's adjoining land, and *Ellis v. Loftus Iron Ore Co.* (4), where the plaintiff's mare was injured by being kicked and bitten

(1) 12 C. B., 160; 21 L. J. (C.P.), 201. (2) Law Rep., 7 Q. B., 31; 1 Eng.

(3) 14 C. B., 213; 23 L. J. (C.P.), 85. Rep., 14.

(4) Law Rep., 10 C. P., 10; 11 Eng. Rep., 214.

1878

Wiseman v. Booker..

by a horse in an adjoining field of the defendant, by reason of the insufficiency of a fence which the latter was bound to maintain, were also referred to.]

*Buck*, for the plaintiff: Apart from any question of neglect of duty on the part of the railway company, here was an act of trespass on the part of the defendant's horses for which, according to the judgment of Lord Coleridge in *Ellis v. Loftus Iron Co* (1), the defendant was clearly liable. That judgment was founded mainly upon *Lee v. Riley* (2). There, through defect of fences which it was the defendant's duty to repair, his mare strayed in the night time from his close into an adjoining field, and thence into a field of the plaintiff's in which was a horse; from some unexplained cause, the animals quarrelled, and the result was that the plaintiff's horse received a kick from the defendant's mare which broke his leg, and he was necessarily killed: and it was held that the defendant was responsible for his mare's trespass.

[LOPES, J.: Suppose the plaintiff had been bound by prescription to repair the fence in question, could he have brought trespass for damage done to his crops in consequence of the fence being so imperfect as to permit the defendant's horses to put their heads over or through it so as to reach them? And, were not the company liable to fence to the same extent?]

[188] \*The company are by the act to provide sufficient fences for the protection of the adjoining land from trespass or to prevent the cattle of the occupiers from straying thereout. It is not found here that the fence was such as to invite the cattle to stray from the adjoining land of the defendant.

LINDLEY, J.: I think the judgment of the county court judge in this case was wrong and must be reversed. The facts are simple. The defendant has land adjoining other land which had been taken by a railway company for the use of their railway, which land the company were bound to fence. The fence which they put up was of such a character as to allow the defendant's horses to pass their heads over and through it and eat and destroy the crops of vegetables planted near it by the company's tenant. Now, the 68th section of the Railways Clauses Consolidation Act, 1845, which imposes upon the company the duty of fencing, enacts in substance that the company shall make and at all times thereafter maintain sufficient posts, rails, hedges,

(1) Law Rep., 10 C. P., 12; 11 Eng. Rep., 215.

(2) 18 C. B. (N.S.), 722; 34 L. J. (C.P.), 212.

ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting *such land* from trespass or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway. The language is a little ambiguous. But the fence is to be for the benefit of the owner or occupier of the adjoining lands. The structure is to be sufficient to keep the cattle of the adjoining owners from straying on to the land of the company. The horses here were straying within the fair meaning of those words; and this it was the duty of the company to prevent. Suppose the company had after erecting such a fence as here described planted yew trees so near to it as to be within reach of the cattle of the adjoining owner, and they had eaten and died, would not the company have been responsible for their loss within the principle of the decision in *Ellis v. Loftus Iron Co.*?<sup>(1)</sup> The plaintiff cannot be in a higher or better position than the railway company. The defendant cannot be made responsible for their breach of duty.

LOPES, J.: I also think that the decision of the county court \*judge was wrong. The action is brought in [189 respect of the defendant's horses straying on land of the plaintiff and destroying his crops. The answer is that the damage was occasioned by defect of a fence which the defendant was under no liability to make and maintain, but the making and maintenance of which was a duty cast by the act of Parliament upon the railway company, whose tenant the plaintiff may for this purpose be assumed to be. The liability cast upon the company by the act is very much like the old prescriptive liability to fence. The judgment must be reversed, with costs.

*Judgment for the defendant.*

Solicitor for plaintiff: *Angove.*

Solicitors for defendant: *Scott, Jarman & Trass.*

(1) Law Rep., 10 C. P., 10; 11 Eng. Rep., 214.

1878

Hancocks v. Lablache.

[3 Common Pleas Division, 197.]

March 9, 1878.

## 197] \*HANCOCKS &amp; CO. V. MADAME DEMERIC-LABLACHE.

*Husband and Wife—Action to charge Separate Estate of Wife—Joinder of Husband as Defendant—33 & 34 Vict. c. 93, ss. 1, 11—Married Women's Property Act, 1870—Judicature Act, 1873, s. 24, subs. 1, 7—Order xvi, Rule 13.*

The husband of a married woman must be joined with her as a defendant in an action to charge wages and earnings which are her separate property under 33 & 34 Vict. c. 93 (The Married Women's Property Act, 1870).

CLAIM alleged that the plaintiffs were jewellers, and that the defendant was an actress and public singer, and as such was engaged in an employment from which she derived wages and earnings separately from her husband, whereby she had acquired separate property within the meaning of the Married Women's Property Act, 1870, and that the property so acquired had been received by the defendant on her sole receipt, and the property and investments thereof were held by the defendant in her own name as her separate property, and were under her sole power and control; that the plaintiffs sold her jewelry, for which she agreed to pay £28 out of her separate property by instalments; that she duly paid two instalments out of her separate property, but had not paid the balance; that the defendant was living apart from her husband, and that the plaintiffs had been unable to discover his address; that the husband had no interest in the property sought to be charged, but the same remained in the hands of the defendant, with the acquiescence of her husband, in order to be applied as her separate property.

The plaintiffs claimed,

1. A declaration that the separate property of the defendant vested in her or in any other person in trust for her was chargeable with the payment of the sum of £14 and interest, and of the costs of the action.

2. Payment of the £14 interest and costs accordingly, or, if the defendant should not admit possession of separate estate sufficient to answer the same, an inquiry of what the defendant's separate property consisted, and in whom it [198] was vested, with proper \*consequential directions for payment thereof of the said sum, interest, and costs.

Demurrer on the ground that the defendant, being a married woman, could not be sued alone.

*L. E. Pyke*, for the defendant, was stopped, and the court called on

*William Baker*, for the plaintiff: The action lies against the defendant alone. She could bind her separate estate, and did so effectually: *Murray v. Barlee* (\*). No personal remedy is claimed, but only a charge on her separate property, such as in *Picard v. Hine* (\*). It is not necessary to make any trustees for the wife parties to the action, *Davies v. Jenkins* (\*); nor to join the husband in a suit in equity.

[LINDLEY, J.: I never heard of the husband not being joined in a suit against his wife and her trustees.]

In *Gaston v. Frankum* (\*) a bill was filed against a married woman and the trustee of her separate property, to enforce performance of a contract by her to take a lease; but the report does not show that the husband was a party to the suit.

[LINDLEY, J.: Counsel appeared for him.]

No one but the defendant, a married woman, was party to the suit of *McHenry v. Davies* (\*). Sect. 1 of 33 & 34 Vict. c. 93, enacting that the separate earnings of a married woman "shall be deemed and taken to be property held and settled to her separate use, independent of any husband," must be read with s. 11, which declares that "A married woman may maintain an action in her own name" for her separate property . . . and shall have in her own name the same remedies as if such property belonged to her as an unmarried woman. She is thereby made a *feme sole* with respect to her separate estate, and can sue or be sued as such, for it is impossible to suppose that the Legislature meant to allow her to sue as if unmarried, and yet, when sued, to set up her coverture. "I think," said Lord Eldon in *Beard v. Webb* (\*), "it will be difficult to contend that the right to sue and the liability to be sued do not stand upon the same footing." The *ratio decidendi* of the \*common law cases establishing that a wife cannot [199 be sued alone does not apply where a charge only is claimed. No doubt a personal decree cannot be made: Bacon's Abrid. (7th ed.), title Baron and Feme (M), note, p. 738. The joinder of the husband was for conformity only; *Bell v. Commissary Hyde and Ux.* (\*), but is no longer necessary. No action shall be defeated by reason of misjoinder of parties, Order XVI, Rule 13. With that rule must be read s. 24,

(\*) 3 My. & K., 209.

(\*) Law Rep., 5 Ch., 274.

(\*) 6 Ch. D., 728; 23 Eng. R., 300.

(\*) 2 De G. & Sm., 561.

(\*) Law Rep., 10 Eq., 88.

(\*) 2 B. & P., 93, at p. 99.

(\*) Prec. Ch., 328.

subs. 1 and 7, of the Judicature Act, 1873, enabling the court to deal with equitable claims.. Must the device of creating a trustee by vesting a small sum in his name on trust for the married woman, and then joining him as a defendant, be resorted to that a technicality may be overcome? If forms are to prevail, the plaintiffs will contend that a married woman cannot plead by attorney, as she has done in this case, but must do so personally.

[He cited also *Manby v. Scott* (1); Com. Dig., tit. Baron and Feme; *Marshall v. Rutton* (2); *Vansittart v. Vansittart* (3).]

*L. E. Pyke*, for the defendant.

[LINDLEY, J., intimated that the argument might be confined to the Married Women's Property Act, 1870.]

The act is express. Sects. 12, 13 and 14 specify in what cases a married woman shall be liable to be sued, viz., for her debts before marriage, for the maintenance of a pauper husband, or of her children; *expressio unius est exclusio alterius*, and there is no provision rendering her liable as a *feme sole* to an action such as this. Order xvi, Rule 8, allows married women, by leave of the court, to sue or defend without their husbands and a next friend, on giving security for costs. But it is obvious that if she could be sued alone the husband would never be joined in actions to charge her separate estate. By order ix, Rule 3, when husband and wife are both defendants, service of the husband shall be deemed good service on the wife, but the court may order that the wife shall be served with or without service on the husband. This provision, however, relates to service only. In *Davies v. Jenkins* (4) the husband was joined. From a note to Order xvi, Rule 8, in Charley's 200] \*Judicature Acts, 3d ed., p. 457, it appears that "In the case of *Oakes v. Bedford* the Queen's Bench Division allowed a demurrer to a statement of claim in an action by a dressmaker against a married lady who was living apart and received an allowance from her husband. 'There would be extreme injustice,' the court said, 'in making a charge upon the allowance in the absence of the husband.' " In *Atwood v. Chichester* (5), where judgment by default had been obtained against a married woman, and she appealed from a refusal of the Queen's Bench Division to set it aside, Cotton, L.J., expressly said that the husband ought to have been joined. The demurrer should be allowed, and leave

(1) 2 Sm. L. C. (7th ed.), 429.

(2) 8 T. R., 545.

(3) 27 L. J. (Ch.), 222.

(4) 6 Ch. D., 728; 23 Eng. R., 300.

(5) Weekly Notes (Jan. 19, 1878), p. 3; 26 W. R., 320, at p. 322.

to amend the action by adding the husband as a defendant may be given, as in *Duckett v. Gover* (\*).

LINDLEY, J.: The question raised, though small, is extremely important, and by no means free from difficulty. This action is brought against a married woman whose earnings and wages, being the proceeds of an employment in which she is engaged apart from her husband, become her separate property within the terms of the Married Women's Property Act, 1870, and the plaintiffs rightly claim no relief against her personally, but only a charge on her property. The objection is that her husband is not made a party to the action. The claim alleges that the wife is living apart from him, that the plaintiffs have been unable to discover his address, and that he has no interest in the property. The point is whether this action can be decided in its present form without the husband; and I am unable to say that it can. If the contrary can be held, it must be decided by a higher tribunal. Before the Married Women's Property Act, 1870, it was well settled in chancery as an inflexible rule, to which there were only special exceptions, such as in a case where a husband might be beyond the jurisdiction, that a suit could not be instituted by or against a married woman without the husband being a party. If she was suing by herself, or next friend, the husband was made plaintiff, and where she was sued he was made defendant: see the cases cited in Daniell's Chancery Practice, p. 162. \*If this action had been a suit brought before the [20] year 1870, no doubt the objection to the form of it could have been taken successfully. Now, the first question here is whether, on the true construction of the Married Women's Property Act, 1870, such property as is therein declared to belong to her for her separate use is property in respect of which she can sue and be sued as if unmarried? That it is such as she can sue for is undoubtedly declared in s. 11, but save in certain excepted cases, the act does not expressly render her liable to be sued, and ss. 1 and 11 cannot be construed to mean that the property in s. 1, declared to belong to her apart from her husband, will, by virtue of s. 11, belong to her in all respects as if she were an unmarried woman. I do not think it mere accident that a different set of phrases was used in s. 1 and s. 11. It may have been thought expedient to give the wife power to sue in actions without joining her husband, and yet not to give power to others to sue her without joining him, and I cannot hold that the words in s. 1 are equivalent to a provision that the

(\*) 6 Ch. D., 82.

property therein mentioned shall be deemed to belong to the wife as if she were unmarried. Starting from that point, I come to the conclusion that the property specified in s. 1 must be treated as belonging to the wife in the manner and to the extent there mentioned, viz., as if settled to her separate use. Whether there has been an intentional or unintentional omission to render the wife liable to suit alone, I cannot supply it. Of that I have no doubt.

So I find that the act has not altered the law as to the proper mode of suing a married woman in respect of that property which by this act is made her separate estate.

Is there anything in the Judicature Act affecting this question? I think there is nothing which alters the whole law on this point, but it is declared that where there is no provision on the subject in the act, the old practice shall be followed. Therefore, as I find in neither the Married Women's Property Act nor the Judicature Act any authority for departing from the old established practice, I must allow the demurrer.

The question is one of much more than mere form, because if the action could be maintained without joining the husband, judgment binding the wife's estate might be obtained 202] against it in his \*absence, whereas he might have been able to successfully resist it, and so protect his own interests.

*Demurrer allowed, with liberty to the plaintiffs to amend, and to serve interrogatories on the defendant inquiring the name and address of her husband.*

Solicitor for plaintiffs: *Pilcher.*

Solicitors for defendant: *Lumley & Lumley.*

The husband is liable for the mere torts of his wife, not for the benefit of, or in the assertion of a right to, her separate estate, and is a necessary party in a suit against her for such tort. If the husband be not served she is entitled to a stay of proceedings until he be served, although he reside out of the State: *Horton v. Payne*, 27 How. Pr., 374; *Fitzsimmons v. Harrington*, 1 Civ. Proc. R., 360; *Marsh v. Potter*, 30 Barb., 506; *Malone v. Stilwell*, 15 Abb. Pr., 425; *Flanagan v. Tinen*, 53 Barb., 587, 37 How. Pr., 130; *Anderson v. Hill*, 53 Barb., 238; *Matthews v. Frestel*, 2 E. D. Smith, 90; *Kowing v. Manly*, 49 N. Y., 193; *McElfresh v. Kerkendall*, 36 Iowa, 224;

*Luse v. Oakes*, Id., 562; *Ferguson v. Brooks*, 67 Maine, 251; *Forster v. Chester*, 26 Ohio St. R., 9; *White v. Seaver*, 6 Irish L. R., 465.

See *Daley v. Houston*, 58 Mo., 361; *Dubois v. Hole*, 2 Vern., 613; *O'Brien v. Bernard*, 7 Irish Eq., 180; *Jackson v. Haworth*, 1 Sim. & Stu., 161; *Garey v. Whittingham*, Id., 163; *Bushell v. Bushell*, Id., 164; *Nichols v. Ward*, 2 Macn. & G., 140; *Armstrong v. Crowley*, Irish L. R., 9 Eq., 509; *Noonan v. Tuthill*, 1 City Courts Rep., 190; *Fitzgerald v. Quam*, 1 Civ. Proc. Rep., 273, 10 Abb. N. C., 28, 62 How. Pr., 331; *Ricei v. Mueller*, 41 Mich., 214; *Austin v. Cox*, 118 Mass., 58.

Although, where a wife has obtained



Grant v. Banque Franco-Egyptienne.

1878

possession of a husband's property from his bailee by a fraud, the bailee can maintain an action against both husband and wife for the wrong, that is not a defence to, and will not bar a recovery by him against the bailee. A liability of a plaintiff jointly with another cannot be set up as a bar to a claim due him individually, nor can a conditional or defeasible liability bar one which is absolute and unconditional: *Kowing v. Manly*, 49 N. Y., 192.

The husband is not a necessary party in an action against the wife for an injury done by her separate property: *Rowe v. Smith*, 55 Barb., 417; *Lansing v. Holdridge*, 58 How. Pr., 449; *Fisher v. Bailey*, 51 N. Y., 150; *Kaufman v. Baum*, 47 N. Y., 577.

The husband is not liable for the conversion of property by the wife, if she claim it as her separate property: *Peak v. Lemons*, 1 Lans., 295; *Lansing v. Holdridge*, 58 How. Pr., 449; *Fisher v. Bailey*, 51 N. Y., 150; *Baum v. Mullen*, 47 N. Y., 577.

In an action to foreclose a mortgage upon real property, the wife of the owner of the equity of redemption may, under sec. 450 of the Code of Civil Procedure, appear and defend by her

own attorney as though she were single: *Janinski v. Heidelberg*, 21 Hun, 439.

See *Moak's Van Santv. Pl.*, 53-4; *White v. Coulter*, 1 Hun, 357, 59 N. Y., 629; *Greiner v. Klein*, 28 Mich., 12; *Watson v. Church*, 3 Hun, 80; *Shuter v. Marsh*, Taylor, K. B. (U.C.), 172; *Nagle v. Taggart*, 4 Abb. N. C., 144; *Clarke v. McElroy*, 10 Grant's (U.C.) Chy., 210.

Where a married woman has a right of action belonging to herself for injuries, the husband cannot without her consent release it: *Chicago, etc., v. Dunn*, 52 Ills., 260.

See *Stevenson v. Mathers*, 67 Ills., 122.

Though if husband and wife be sued for tort of the wife, the husband has a right to control the suit: *Coolidge v. Parris*, 8 Ohio St. R., 594.

In an action of tort against husband and wife for the wrongful act of the wife, if the husband and wife be taken in execution, the court will order the discharge of the wife in case she has not any separate property available for the payment of the damages: *Moore v. Elliot*, Irish Rep., 5 C. L., 301; *Blik v. Halpenn*, Sir Geo. Cooke's R. (ed. 1872), 176.

---

[3 Common Pleas Division, 202.]

March 20, 1878.

[IN THE COURT OF APPEAL.]

## GRANT V. THE BANQUE FRANCO-EGYPTIENNE.

*Practice—Appeal—Staying Payment of Costs.*

The recovery of costs payable under an order will not be stayed pending an appeal to the House of Lords, if the solicitors to whom they are payable give their personal undertaking to refund in case of the order being reversed.

Payment of costs will not be stayed on the ground that another proceeding in the same action is pending under which costs may become payable to the applicant.

[3 Common Pleas Division, 208.]

April 6, 1878.

**208] \*HUNT V. THE WIMBLEDON LOCAL BOARD.**

*Contracts by Corporations—Distinction between trading Corporations and Local Boards or Corporations created for public Purposes—Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 85—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 173, 174.*

Sect. 85 of the Public Health Act, 1848, and s. 174 of the Public Health Act, 1875, enact (without any words of prohibition) that "every contract made by a local board, or by an urban authority, whereof the value or amount exceeds [£10] £50, shall be in writing, and sealed with the common seal of such authority."

The defendants, a "local board" and an "urban authority" under the above mentioned acts, verbally directed their surveyor to employ the plaintiff to prepare plans for new offices. The plans were prepared and submitted to and approved and used by the defendants, but the proposed offices were never erected. There was no contract under the corporate seal, nor any ratification under seal of the act of the surveyor in procuring the plans; nor was there any resolution of the board authorizing their preparation:

*Held*, that, by reason of the noncompliance with the statutory requirements, the contract could not be enforced,—notwithstanding that the jury found that the board authorized their surveyor to procure the plans and ratified his act, that new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of them.

**ACTION** for work and labor done and money paid by the plaintiff at the request of the defendants.

**209]** \*At the trial before Lindley, J., at Westminster, on the 13th and 14th of March, 1878, it was proved that the surveyor of the defendants, acting under verbal instructions from them, in May, 1875, employed the plaintiff, an architect, to prepare plans and drawings for offices which they had determined to erect. The plans were submitted to and approved by the defendants, and quantities were by their direction taken out, and advertisements were issued for tenders for the building. The proposed plan, however, was found to be too expensive, and, though tenders were received, none was accepted; and ultimately offices upon a less extensive scale were erected from plans furnished by another architect.

It was objected on the part of the board, that, inasmuch as they were by s. 85 of the Public Health Act, 1848<sup>(1)</sup>, and s. 174 of the Public Health Act, 1875<sup>(2)</sup>, only empowered to contract under seal, and this contract, which was for an amount exceeding the prescribed limit, not being under seal, the action could not be maintained. For the plaintiff it was insisted that the work in question, being one of neces-

<sup>(1)</sup> 11 & 12 Vict., c. 63.

<sup>(2)</sup> 38 & 39 Vict., c. 55.

sity, did not fall within the description of contracts which were by the statutes required to be under seal.

In answer to questions put to them by the learned judge, the jury found that the surveyor was authorized by the board to employ the plaintiff to prepare the plans, and that his act was subsequently ratified by them; and further, that offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the erection of the buildings for which they were designed: and they assessed their value at £94. Judgment was deferred.

March 22. *Patchell*, Q.C., moved to enter judgment for the plaintiff upon the findings of the jury.

*Marriott*, Q.C., and *Paterson*, showed cause: The question turns upon the true construction of s. 85 of the Public Health Act, 1848, which was in force at the time the order for the plans was given, and ss. 173, 174 of the Public Health Act, 1875<sup>(1)</sup>, which so far \*as regards this [210

(<sup>1</sup>) The 11 & 12 Vict. c. 63, s. 85, enacted "that the local board of health may enter into all such contracts as may be necessary for carrying the act into execution; and every such contract whereof the value or amount shall exceed £10 shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof, or (in the case of a corporate district) sealed with the common seal, and shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall fix and specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed; and every contract so entered into, and duly executed by the other parties thereto, shall be binding on the local board by whom the same is executed, and their successors, and upon all other parties thereto, and their executors, administrators, successors, and assigns, to all intents and purposes."

The 38 & 39 Vict. c. 55, s. 173, enacts that "any local authority may enter into any contract necessary for carrying this act into execution."

And s. 174 enacts that, "with respect to contracts made by an urban authority under this act, the following regulations shall be observed, viz.:

"(1.) Every contract made by an ur-

ban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority:

"(2.) Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed:

"(3.) Before contracting for the execution of any works under the provisions of this act, an urban authority shall obtain from their surveyor an estimate in writing as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work or for executing and also maintaining the same in repair during a term of years or otherwise:

"(4.) Before any contract of the value or amount of £100 or upwards is entered into by an urban authority, ten days' public notice at the least shall be given, expressing the nature and purpose thereof and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same:

"(5.) Every contract entered into by

matter do not materially differ. There are, no doubt, authorities to show that some of the requirements mentioned in these enactments are directory only, and may be dispensed with. There is a material distinction between corporations like that now \*in question, intrusted with the performance of public duties and functions, and corporations created merely for trading purposes. In the case of corporations of the latter description, more laxity in the making of contracts is permitted than in the former; *Sanders v. St. Neot's Union* (\*); *Frend v. Dennett* (\*) in this court, and also in equity (\*), where the rule of law is laid down by Wood, V.C. And see *South of Ireland Colliery Co. v. Waddle* (\*). Further, it was not competent to the local board to delegate their power of contracting to their surveyor or to any other person, so as to bind the ratepayers. Where it was intended by the Legislature to give the board power to delegate any portion of its authority, they have so provided, as in ss. 200, 201 of the Public Health Act, 1875. And see *Cook v. Ward* (\*). The first finding of the jury, therefore, is immaterial. There are many cases in equity, under the Winding-up Acts, where it has been decided that the directors even of a trading corporation can only act within the scope of their special act or articles of incorporation. See *In re Leeds Banking Co.*, *Howard's Case* (\*); *Riche v. Ashbury Railway Carriage and Iron Co.* (\*); *In re County Palatine Loan and Discount Co.*, *Cartmell's Case* (\*).

[LINDLEY, J., referred to *Crompton v. Varna Ry. Co.* (\*).]

The finding that the act of the surveyor was ratified by the board is equally immaterial; for, the board could not, even under seal, ratify a contract which they had no power to enter into.

*Patchett, Q.C.*, and *E. Clarke*, contra. The 173d section of the Public Health Act, 1875, enacts generally that "any local authority may enter into *any contracts necessary for carrying the act into execution.*" The jury have expressly

an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed and their successors, and on all other parties thereto and their executors, administrators, successors, or assigns, to all intents and purposes," &c.

(1) 8 Q. B., 810.

(2) 4 C. B. (N.S.), 576; 27 L. J. (C. P.), 314.

(3) 5 L. T. (N.S.), 78.

(4) Law Rep., 3 C. P., 468; on appeal, 4 C. P., 617.

(5) 2 C. P. D., 255; 20 Eng. R., 514.

(6) Law Rep., 1 Ch., 561.

(7) Law Rep., 9 Ex., 224; 10 Eng. R., 396; 7 H. L. C., 653; 14 Eng. R., 42.

(8) Law Rep., 9 Ch., 691; 10 Eng. R., 672.

(9) Law Rep., 7 Ch., 562; 3 Eng. R., 509.

found that this was a contract of that description. The contracts to be made "under this act," which are to be made subject to the provisions and restrictions of s. 174, are, the general contracts as to paving, lighting, watering, and dusting the streets and houses of the district, and not contracts like the present, which is \*expressly au- [212  
thorized by s. 197<sup>(1)</sup>. Assuming that this was a contract under s. 174, if it were executory, no action would lie upon it, for want of the observance of the conditions imposed by the act; but it is otherwise where the work has been done, and the board have had the benefit of it: *Clarke v. Cuckfield Union*<sup>(2)</sup>; *Sanders v. St. Neot's Union*<sup>(3)</sup>; *Nowell v. Mayor of Worcester*<sup>(4)</sup>; *Reuter v. Electric Telegraph Co.*<sup>(5)</sup>; *Nicholson v. Bradfield Union*<sup>(6)</sup>. In *Pearce v. Morrice*<sup>(7)</sup>, Taunton, J., lays down the following rule for distinguishing between imperative and merely directory enactments,—“A clause is *directory* where the provisions contain mere matter of direction, and no more; but not so when they are followed by words of prohibition.” Sect. 173 of the act of 1875 contains no words of prohibition. The defendants here have had the benefit of the plaintiff's work; the contract was entered into by their surveyor by their direction; and the jury have found that his acts were ratified by them. Whether the ratification was under seal or by acts and conduct can make no difference.

*Cur. adv. vult.*

April 6. LINDLEY, J.: This is an action brought to recover compensation for certain plans made by the plaintiff for offices contemplated by the defendants, but never in fact erected. The plans were made by the directions of the defendants' surveyor, and, when made, they were submitted to the defendants' board, and were so far approved and adopted that quantities were taken out and advertisements were issued for tenders for the erection of offices according to the plans. The tenders, however, proving too high, they were not accepted, and the offices designed by the plaintiff were not constructed. The plans, therefore, were of no further use to the defendants. Other offices have, however, been constructed for them from other plans.

The jury have found that the defendants' board authorized

(1) Section 197: "Every urban authority shall from time to time provide and maintain such offices as may be necessary for transacting their business and that of their officers and servants under this act."

(2) 21 L. J. (Q.B.), 349.

(3) 8 Q. B., 810.

(4) 9 Ex., 457; 23 L. J. (Ex.), 139.

(5) 6 E. & B., 341; 26 L. J. (Q.B.), 46.

(6) Law Rep., 1 Q. B., 620.

(7) 2 Ad. & E., 96.

213] their \*surveyor to employ the plaintiff to prepare the plans, and ratified the act of their surveyor in procuring them; and the jury have further found that some new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of the offices for which they were designed; and they assessed the damages to which the plaintiff is entitled (if he is entitled to any from these defendants) at £94.

Under these circumstances, the plaintiff would clearly be entitled to judgment, were it not for the fact that the defendants are a corporation, and that their power of contracting is regulated by act of Parliament. The act which was in force when the plans were ordered was the Public Health Act, 1848 (11 & 12 Vict. c. 63). This act was repealed and replaced by the Public Health Act, 1875 (38 & 39 Vict. c. 55), before the plans were finished. But the 85th section of the first act, although broken into paragraphs, and differently printed, was substantially re-enacted by ss. 173, 174, of the second act; and, having carefully compared the above sections, I can find no difference material to the present case between s. 85 of the act of 1848 and ss. 173 and 174 of the act of 1875, except that £50 is substituted for £10 as the limit for contracts which do not require any particular formalities.

It is admitted that the defendants were a local board within the meaning of s. 85 of the act of 1848, and an urban authority within the meaning of s. 174 of the act of 1875; and it is admitted that there was no contract under seal with the plaintiff, and no ratification under seal of any contract with him. Neither was there in fact any resolution expressly authorizing the preparation of the plans or expressly referring to or ratifying their preparation for the board.

The question I have to determine is, whether, under the above circumstances, and having regard to the above enactments, the defendants are liable to pay for the plans in question.

Now, in the first place, it is to be observed that the defendants are not a trading or commercial corporation having gain for its object: they are created for the purposes mentioned in the Public Health Acts, and they are in fact the representatives of and trustees for the inhabitants of Wimbledon for such purposes. I cannot therefore regard as 214] applicable to this case those numerous \*decisions which show that incorporated companies having gain for their object are liable in respect of contracts not under seal,

provided they are necessary for and incidental to the purposes for which they are created. Such cases, for example, as *South of Ireland Colliery Co. v. Waddle* (\*) and *Reuter v. Electric Telegraph Co.* (\*) do not, in my opinion, govern this case.

Neither can I treat the defendants as a corporation to which no act of Parliament is specially applicable. It is not necessary, in order to decide this case, to try to reconcile the conflicting decisions upon the general question whether a corporation not governed by any special act of Parliament is liable on unsealed contracts of which it has had the benefit. Where the unsealed contract is of such a nature as to be the subject of an action for specific performance, and such contract has been in part performed, under circumstances which render the equitable doctrines of part performance applicable, the contract will, I apprehend, bind such a corporation, *Crook v. Seaford* (\*): but, in other cases, it is extremely doubtful whether the mere fact that a contract, not otherwise binding on the corporation, has been wholly or partly performed renders the corporation liable to be sued either on the contract or on a *quantum meruit*. *Nicholson v. Bradfield Union* (\*), *Clarke v. Cuckfield Union* (\*), and *Haigh v. North Brierly Union* (\*), are the leading authorities in favor of the corporation being liable; and *Waghorn's Case* (\*), before Mr. Justice Manisty, may be added to them. On the other hand, *Mayor of Ludlow v. Charlton* (\*), *Lamprell v. Billericay Union* (\*), *Smart v. West Ham Union* (1), at law, and *Kirk v. Bromley Union* (1), and *Crampton v. Varna Ry. Co.* (1), in equity, are leading authorities to the contrary.

In this case, however, I have to construe and apply a special act of Parliament; and, although some of the provisions of the \*above mentioned sections are not in [215 my opinion applicable to such a contract as I have here to deal with, the provision requiring a seal where the contract is for more than £10 or £50, as the case may be, is I think applicable to it; and, having regard to the objects and terms of those sections, and to the case of *Frend v. Den-*

(1) Law Rep., 3 C. P., 463; on appeal, Law Rep., 4 C. P., 617.

(2) 6 E. & B., 341; 26 L. J. (Q.B.), 46.

(3) Law Rep., 10 Eq., 678, and 6 Ch., 551.

(4) Law Rep., 1 Q. B., 620.

(5) 21 L. J. (Q.B.), 349.

(6) E. B. & E., 873; 28 L. J. (Q.B.), 62.

(7) Not reported.

(8) 6 M. & W., 815.

(9) 3 Ex., 283.

(10) 10 Ex., 867; 24 L. J. (Ex.), 201; 11 Ex., 867; 25 L. J. (Ex.), 210.

(11) 2 Ph., 640.

(12) Law Rep., 7 Ch., 562; 3 Eng. R., 509.

*nett* (\*), I am unable to hold that the clause requiring a seal is a merely directory clause.

In *Nowell v. Mayor of Worcester* (\*), other clauses requiring other things to be done by the board were held to be directory only, because the plaintiff could not ascertain whether they were done or not. This reason has no application to the clause requiring contracts to be sealed; and it appears to me that I should be depriving the rate-payers of the protection intended to be afforded them by the statutes with which I have to deal, if I held the defendants liable to pay for work done under a contract required by those acts to be under seal, and not in that form.

The observations of Baron Rolfe in *Mayor of Ludlow v. Charlton* (\*) are in my opinion very pertinent to cases of this description; and, thoroughly concurring, as I do, with those decisions which have relaxed the old rule as to the necessity for a seal to bind certain classes of corporations, I do not feel myself at liberty to depart from the plain words of the statutes by which this case is governed.

Notwithstanding, therefore, the answers given by the jury to the questions put to them, I give judgment for the defendants, with costs.

*Judgment for the defendants.*

Solicitor for plaintiff: *W. J. Foster.*

Solicitor for defendants: *W. H. Whitfield.*

(<sup>1</sup>) 4 C. B. (N.S.), 576; 27 L. J. (C.P.), 314; and in Equity, 5 L. T. (N.S.), 73.

(<sup>2</sup>) 9 Ex., 457; 23 L. J. (Ex.), 139.  
(<sup>3</sup>) 6 M. & W., 815.

[3 Common Pleas Division, 216.]

Feb. 8, 1878.

[IN THE COURT OF APPEAL.]

216]

\*MORTIMORE V. CRAGG.

In the Matter of the SHERIFF OF SURREY.

*Sheriff—Fieri Facias—Poundage—Recovery of Judgment Debt without Sale—*  
28 Eliz. c. 4.

A sheriff, who by compulsion of a writ of *fi. fa.*, recovers the amount of a judgment debt, is entitled to poundage, although after seizure he is paid out by the execution debtor, without a sale of any portion of the goods seized.

*Roe v. Hammond* (2 C. P. D., 300,) overruled.

AN order had been obtained to show cause why the sheriff of Surrey should not repay to the defendant the sum of £4 9s. for poundage, on the ground that there was no sale, and that the sheriff was not entitled to poundage.



It appeared from the affidavits that judgment in this action having been signed against the defendant, the plaintiff issued execution thereon and the sheriff seized the defendant's goods; after remaining in possession thereof for some days he gave them up to the defendant again without selling them, upon the defendant paying to the sheriff's officer the amount then due for debt and costs on the judgment and possession money, and in addition the sum of £4 9s. for poundage, which was claimed by the sheriff's officer.

The order in the Common Pleas Division was made absolute for the repayment by the sheriff to the defendant of the sum of £4 9s., the court (Cockburn, C.J., and Grove, J.) considering themselves bound by the authority of *Roe v. Hammond* (\*). The sheriff appealed.

Feb. 7, 8. *Sir H. Giffard*, S.G. (*Grantham*, Q.C., with him), for the sheriff: The decision in the Common Pleas Division was wrong. It is plain from the authorities cited in *Bissicks v. Bath Colliery Co.* (†) that where the judgment debt is paid to the sheriff by compulsion of the writ of fieri facias he is entitled to poundage. The only decision to the contrary is *Roe v. Hammond* (\*), and that case is clearly inconsistent with the course of previous authorities.

\**Talfourd Salter*, Q.C., and *Lumley Smith*, for [217 the defendant: This court cannot decide in favor of the sheriff without overruling *Roe v. Hammond* (\*), and the decision in that case was founded upon the statement given in Lofft, p. 433, as to the practice then prevailing in the Court of King's Bench. The sheriff must make out a statutory right to poundage, for at common law he was bound to execute the king's writ without receiving any remuneration, *Graham v. Grill* (‡); and none of the statutes conferring the right to poundage empower the sheriff to levy it where there has been no sale: 28 Eliz. c. 4; 3 Geo. 1, c. 15; 43 Geo. 3, c. 46; 1 Vict. c. 55; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 123; Rules of the Supreme Court, Order XLII, Rule 13. The language of Lord Ellenborough, in *Bilke v. Havelock* (¶), is a very strong authority to show that unless there be a sale the sheriff is not entitled to poundage. *Rex v. Robinson* (¶) explains the decision in *Alchin v. Wells* (¶), which at first sight might seem to show that the sheriff is entitled to poundage although there has been

(†) 2 C. P. D., 300; 21 Eng. R., 297.

(‡) 2 Ex. D., 459; 21 Eng. R., 550.

(¶) 2 M. & S., 294; per Lord Ellenborough, C.J., at p. 297.

(\*) 3 Camp., 374.

(\*) 2 C. M. & R., 334

(\*) 5 T. R., 470.

no sale; the real bearing of these cases is pointed out by Lord Coleridge, C.J., in *Roe v. Hammond* (\*). The reasoning of Jervis, C.J., in *Masters v. Louther* (\*), shows that an actual sale is necessary to confer the right to poundage. Upon a similar principle the sheriff is not entitled to poundage, where after seizure and before sale the judgment and all subsequent proceedings are set aside for irregularity: *Miles v. Harris* (\*). The question now in dispute did not arise in *Sneary v. Abdy* (\*), for in that case the sheriff claimed only possession money, fees, and incidental expenses; but in *Roe v. Hammond* (\*) it was stated by Grove, J., that in *Sneary v. Abdy* (\*) all the judges were of opinion that the right to poundage depended upon an actual levy of the debt. The word "levy" implies more than seizure; it means seizure and sale.

*Grantham*, Q.C., in reply: Money is "levied" by the 218] sheriff, if \*it is actually received by him; in Tomlin's Law Dictionary, "levy" is said to mean "to collect or exact;" and according to this interpretation if the amount is actually obtained by virtue of the writ, it is "levied," and it becomes immaterial to consider whether there is or is not a sale. In the present case the seizure by the sheriff compelled the defendant to pay the amount of the judgment debt, and therefore nothing is wanting to enable him to enforce the right to poundage: *Rex v. Jetherell* (\*). If any portion of the judgment debt is paid after a valid seizure, nothing afterwards done by the parties to the action can take away the right to poundage: *Alchin v. Wells* (\*); *Chapman v. Bowlby* (\*).

BRAMWELL, L.J.: I am of opinion that the judgment should be reversed. It seems to me, that if we look at the statute and the authorities, the sheriff is entitled to poundage. The statute 28 Eliz. c. 3, says that the sheriff shall not take more than 12*d.* for every 20*s.* "for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person or persons whatsoever . . . that he or they shall so levy or extend and deliver in execution." I am of opinion that "deliver in execution" must be coupled with "extent;" it cannot apply to body or goods, and therefore "deliver in execution" should be limited to process in respect of lands. The sheriff holds an in-

(\*) 2 C. P. D., 300, at pp. 305, 306; 21 Eng. R., 297, 301, 302.

(\*) 11 C.B., 948, at p. 953; 21 L. J. (C.P.), 130, at p. 132.

(\*) 12 C. B. (N.S.), 550; 31 L. J. (C.P.), 361.

(\*) 1 Ex. D., 299.

(\*) 2 C. P. D., 300, at p. 307; 21 Eng. R., 297, 301, 302.

(\*) Parker, 177.

(\*) 5 T. R., 470.

(\*) 8 M. & W., 249.

quisition and delivers the land in execution, but he does not deliver goods under a fi. fa. I think Watson's, B., opinion, as expressed in *Carter v. Hughes* (1), confirms this view. I do not think those words have any connection with a writ of fi. fa., because the sheriff does not deliver the goods in execution; he delivers the money because he has made it from a sale of them. It then becomes a debt due from him, and an action for money had and received would lie against him. He is to recover it; the words are "*shall so levy*;" and notwithstanding that it is his duty and he is bound to recover it, he cannot sell the goods after a tender: *Taylor v. Bekon* (2); *Brun v. Hutchinson* (3). Why is a payment to the sheriff upon a fieri facias a good plea? It must be because he has authority to levy the debt by receiving money. I do not wish to \*question the decision of [219 *Nash v. Dickenson* (4). That was a perfectly correct decision, because there was no seizure in that case. The sheriff there did not "*levy*." The test is, supposing the sheriff had not the authority of the court, could an action of trespass be brought against him? I think the words in the statute of Elizabeth, "*shall so levy*," mean "*shall seize*, and thereby get the money." In addition to the construction of the statute, there is a current of authorities which all run one way. The decisions in some of these cases go further than is necessary to support the present case. It is the seizure made by the sheriff that produces the money; therefore, where there is a compromise after the seizure but before any sale, the sheriff is entitled to his poundage. I cannot find a trace of a real authority against the claim of the sheriff for his poundage, and I think that he is entitled to our judgment. I ought to mention that in the case of judgment and execution being set aside through no fault of the sheriff, he would be entitled to his poundage if he has actually received the amount of the judgment debt.

BRETT, L.J.: I am of the same opinion. Where an execution issues the transaction may be divided into four parts: 1. The delivery of the writ to the sheriff: 2. Seizure: 3. The possible payment of money after seizure: 4. If no payment, sale. The first step does not entitle the sheriff to poundage; and if he does not seize, *Nash v. Dickenson* (4) is an authority that he is not entitled to poundage. Although he seizes, nothing may be realized, because the seizure may be wrongful; it may be withdrawn by direction

(1) 2 H. &amp; N., 714, at p. 723.

(2) 2 Lev., 203.

(3) 2 D. &amp; L., 43.

(4) Law Rep., 2 C. P., 252.

of law, then the sheriff would receive no poundage. Then comes the case after seizure. The money may be paid by the execution debtor either directly or indirectly: directly by virtue of the seizure to the sheriff; indirectly where payment is made by means of a compromise which is the consequence of the seizure; in either of those cases the sheriff is entitled to poundage. If a sale takes place, again the sheriff is entitled to poundage. As to the construction of 28 Eliz. c. 4, I agree with Lord Justice Bramwell. The proper construction is "goods levied," and "lands extended," and "delivered in execution." The words "delivered in execution" do not apply to an execution under a writ of fi. fa. 220] The word "levy" in legal meaning is where goods are seized and money obtained by compulsion. If that is the meaning of levy, it does not necessarily comprise sale. *Alchin v. Wells* (1) is in point. The court there say: "The sheriff who has levied is entitled to his poundage." It seems to me that *Rex v. Robinson* (2) is to the same effect. Where the money has been obtained by the seizure, although there has been no sale, the sheriff has a right to his poundage. In *Chapman v. Bowlby* (3) both Lord Abinger, C.B., and Parke, B., recognize the principle laid down in *Alchin v. Wells* (1), and hold that where, by the compulsion of the writ, the execution debtor has been forced to pay the debt, the sheriff is entitled to his poundage. The last case decided on the point was *Bissicks v. Bath Colliery Co.* (4), before Cockburn, C.J., and Cleasby, B., who acted upon the rule laid down in the previous cases. There is not one decision to the contrary except *Roe v. Hammond* (5) and the case under consideration. To entitle the sheriff to his poundage a sale is not necessary; it is enough if there is a seizure and the money is obtained either directly or indirectly. General principles, the construction of the statute, and the authorities, all support the conclusion that the sheriff in the present case is entitled to the poundage which he claims.

COTTON, L.J.: The first question is whether the words of the statute of Elizabeth, "delivered in execution," apply to the execution of a writ of fi. fa. I agree with Lord Justice Bramwell that they do not. When can the sheriff be said to levy? It is true there must be a seizure, but when he has seized it is not necessary, to enable him to recover poundage, that he should sell; it is sufficient if by reason

(1) 5 T. R., 470.

(3) 8 M. &amp; W., 249.

(2) 2 C. M. &amp; R., 334.

(4) 2 Ex. D., 459; 21 Eng. R., 550.

(5) 2 C. P. D., 300; 21 Eng. R., 297.

of the seizure the money is obtained directly or indirectly; if it is obtained, then there has been a levy. All the authorities go to this conclusion. Whenever process is made effectual by payment of money, the sheriff is entitled to his poundage.

*Judgment reversed.*

Solicitors for the sheriff: *Abbott & Co.*

Solicitor for defendant: *S. Chester.*

See 29 Eng. Rep., 553 note. It is only when the judgment itself is satisfied or discharged, or the attorney has countermanded the execution, that the sheriff may look to him for his fees: *Van Kirk v. Sedgwick*, 13 N. Y. Weekly Dig., 478.

[8 Common Pleas Division, 221.]

Jan. 14, 1878.

[IN THE COURT OF APPEAL.]

**\*BERGHEIM V. THE GREAT EASTERN RAILWAY [221  
COMPANY.**

*Railway Company—Common Carriers—Passenger's Luggage placed in Compartment with him—Negligence.*

A railway company are not insurers in respect of luggage placed at a passenger's request in the same compartment in which he intends to travel; and they will not be liable to compensate him if luggage so placed is lost or stolen without any negligence on their part.

**ACTION** against the defendants, as carriers, for loss of a dressing bag.

At the trial before Manisty, J., during the Trinity Sittings, 1877, the following facts were proved: the plaintiff and his wife came to a station of the defendants for the purpose of being carried as passengers with their luggage to Yarmouth. After taking tickets for the journey, the plaintiff went on to the platform, by the side of which the train was standing, and there saw one of the porters employed by the defendants, named Bishop. As the train was not to start for a few minutes, the plaintiff asked Bishop to take charge of the luggage, to put it into a compartment, and to look after it, while the plaintiff went to the refreshment room. Bishop replied it would be all right, and he would look after the luggage. Bishop put the plaintiff's luggage, including the dressing bag, into a first-class compartment, and placed it upon the seats: he turned the key of the door of the compartment. The plaintiff and his wife then went to the refreshment room; they returned to the train shortly before

1878

*Bergheim v. Great Eastern Railway Co.*

the time appointed for starting. Bishop said it was all right, and the door of the compartment being still locked he unlocked it for the plaintiff and his wife: they entered the compartment and found that the bag was missing. The bag was not recovered.

The jury, in answer to questions put by the judge, found that the compartment and not the luggage van was the proper place to put the bag, having regard to the common usage at the defendants' station; that Bishop was acting within 222] the scope of \*his employment by the defendants, and that he took charge of the bag as their servant and not as the plaintiff's; that there was no negligence on the part of either the defendants or their servants which conduced to the loss of the bag; that the plaintiff was not guilty of negligence which conduced to the loss of the bag; that the bag was stolen, but there was no evidence to show by whom it was stolen.

The learned judge directed the judgment to be entered for the defendants. The plaintiff appealed.

1877. Nov. 21, 22. *Grantham, Q.C.*, and *R. E. Webster*, for the plaintiff.

*Metcalfe, Q.C.*, and *Lindsell*, for the defendants.

The arguments are sufficiently stated in the judgment. In addition to the authorities mentioned in the judgment the following were cited: *Macrow v. Great Western Railway Co.* ('); *Gatliffe v. Bourne* ('); *Middleton v. Fowler* ('); *Upshare v. Aidee* (').

*Cur. adv. vult.*

Jan. 14. The judgment of the Court (Bramwell, Brett and Cotton, L.JJ.) was delivered by

COTTON, L.J.: In this case the facts are as follows: [The learned judge stated them as above.] It has been found that neither the company nor the plaintiff was guilty of negligence. The company, therefore, cannot be held liable unless they are to be held to have undertaken the liability of common carriers in respect of the bag, the loss of which is the cause of complaint in this action.

The liability of a common carrier is, as compared with that of other bailees, exceptional. He is answerable for the loss of goods intrusted to him as such, though the loss be in no way caused by any default on his part. He is considered as having contracted to insure the safe delivery of, that is to say, as having contracted to carry and deliver safely and

(<sup>1</sup>) Law Rep., 6 Q. B., 612.

(<sup>3</sup>) 1 Salk., 282.

(<sup>2</sup>) 4 Bing. N. C., 314: in error, 3 Man. & G., 643.

(<sup>4</sup>) Comyns, 25.

securely (the act of God and the Queen's enemies alone excepted), the goods of which he, as \*common carrier, [223 is bailee. The reason why the law implied that this is his contract, was that the carrier had by himself or his servants during the bailment, at times and in places where he could not even be supervised, the exclusive control and care of the goods intrusted to him by the owner; and consequently, to prevent fraud, the law imposed on those who contracted to carry goods as common carriers the obligation also to undertake to insure their safety. The rule and the reason for it are thus stated by Lord Chief Justice Holt in *Coggs v. Bernard* (\*). "The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." This, though apparently a stringent rule, was founded on good sense. But if this implication had been applied to goods, of which in consequence of the act of the owner the carrier had not during their carriage the exclusive or absolute control or care, it would, in our opinion, have been unreasonable. So to apply it would have been to extend a contract of insurance, which the law had originally implied, because the carrier had the exclusive, or, at least, absolute control and care of the goods, to goods as to which his position was entirely different. When the reason for raising an implied contract does not exist, the implication ought not to be made, and in none of the earlier cases, which dealt with and established the common carrier's liability, was a contract of insurance implied in respect of goods over which he had not absolute control. In our opinion, as regards goods in such position, no such contract ought to be implied.

The next question, then, is whether it can be said that goods \*which at the request of a passenger are put [224 into the carriage in which he travels, are under the control and care of the company to such an extent that a contract

(\*) 2 Ld. Raym., 918.

of insurance on the part of the company can be implied. They are put into that carriage, because they may be required by the passenger during the journey, or because he wishes to take special care of them and to have them under his eye, or because he desires to take them away with him as soon as the train stops. At all events, they are put in that carriage at the request or with the consent of the passenger, in order that, or in such a manner that he has some control over them during the transit. While the train is in motion, the company can exercise no control whatever over the goods as distinct from the control they have over the train. There may be in the same carriage with the owner of the goods other persons, who by reason of the passenger's own negligence may be tempted or enabled to injure or destroy the goods, or deprive the owner of them. If the company are, in respect of the goods, liable as common carriers, though this loss may happen by no default of the company, but by reason of the passenger's own negligence, they must nevertheless make good the loss, or at least must do so unless they can fulfil the difficult burden of proof that the negligence of the passenger occasioned the loss. This would not, in our opinion, be reasonable.

But it was urged that, at least when the owner is reasonably absent from his carriage at stations during the journey, the company must be liable, and that the contract of the company may be considered as a contract of insurance, with an exception that while the train is in motion and the owner in the carriage with some charge of the goods, there should be a different liability. But this would be implying a new form of contract, entirely different from the contract of insurance implied in the case of a common carrier.

Again, it is said that the company have been held to be common carriers of passengers' luggage, which is put into the van or other place appropriated for the purpose, and from this it is argued that, the company, being common carriers of passengers' luggage in a passenger train, are so of all such luggage carried in the train. But the real question is, whether, as regards the particular goods, there 225] \*is an implied contract of insurance. This must depend on the circumstances under which these goods are received, and though the company are common carriers of goods, and do receive some passengers' luggage carried by a passenger train under circumstances from which a contract of insurance can be implied, it does not follow that this is the case as regards articles which, though carried by the same train, are received and carried under different circum-



stances. As regards that portion of a passenger's luggage which is, at his request or with his consent, placed in the same carriage in which he is to travel, we think, for the reasons given above, that there is no sufficient ground laid upon which a court can properly make a presumption that the company carry them under a liability or implied contract to carry them safely at all hazards, the act of God and of the Queen's enemies alone excepted.

But then it is urged that, if the company are not liable to the extent insisted on, they are not in any way liable for the luggage of a passenger placed at his request and with their assent in the carriage in which he is to travel, and that such an entire absence of liability is unreasonable, and therefore that the only reasonable conclusion is to imply a common carrier's liability. But, in our opinion, it cannot properly be said that the company, if not liable as common carriers, incur no liability: the company undertake to carry the passenger; they equally undertake to carry his luggage or goods, which with their consent are placed with him in the carriage in which he is; and they are not gratuitous bailees of those goods, as they receive them into their carriages in consideration of the passenger paying his fare. The company therefore must, according to ordinary principles, be held liable in respect of those goods, as bailees for hire and contractors to carry, and therefore liable for loss or injury caused by negligence, but not otherwise; the company have, in fact, the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself.

This is our view on principle; it remains for us to consider the decisions bearing on this question.

*Cohen v. South Eastern Ry. Co.* <sup>(1)</sup> is the only case cited which \*came before a court of error. The question [226 in that case was not as to luggage carried by the passenger in the carriage with him, and all that the court decided was that the company were liable for the loss of passenger's luggage carried in the same train, but not in the same carriage with him, when occasioned by the negligence of the servants of the company.

The plaintiff also relied on *Robinson v. Dunmore* <sup>(2)</sup>. The decision in that case is not in point, for the defendant had expressly contracted that the goods should be safely carried, and the court held that he was not relieved from this contract by the plaintiff sending his servant with the defendant. It is true that Mr. Justice Chambre, in giving

<sup>(1)</sup> 2 Ex. D., 253; 20 Eng. R., 525.

<sup>(2)</sup> 2 B. & P., 416.

1878

Bergheim v. Great Eastern Railway Co.

judgment, stated that it had been held that a coach proprietor is liable as a common carrier for a passenger's luggage, though placed under the eye of the passenger. But in such a case it is obvious that the servants of the coach proprietor did, although the passenger was on the coach, retain an absolute control over the goods in question, just as much as if the passenger had not been there.

The cases of *Le Conteur v. London and South Western Ry. Co.* (1), *Butcher v. London and South Western Ry. Co.* (2), *Richards v. London, Brighton and South Coast Ry. Co.* (3), may with more reason be relied on for the plaintiff. These were all cases where the claim against the company was for the loss of articles placed by or at the wish of a passenger in the carriage, in which he travelled or intended to travel. In the first case, though judges to whose opinion great weight is due, expressed themselves in terms which favor the contention that the company is liable, the decision was on other grounds in favor of the company, and the opinion expressed by the judges may be explained as suggested by Mr. Justice Willes in *Talley v. Great Western Ry. Co.* (4). In the other cases of *Butcher v. London and South Western Ry. Co.* (2), and *Richards v. London, Brighton and South Coast Ry. Co.* (3), the judgments were against the defendants, and were certainly, as it would seem, based on the view that the company were liable as common carriers. In *Butcher v. London and South Western Ry. Co.* (2), however, there was some evidence of negligence on the part of the company. And none of the cases were before a court of error. Moreover, in a later case of *Talley v. Great Western Ry. Co.* (4), the Court of Common Pleas decided that the company was not liable for the loss of a portmanteau placed at the passenger's request in the same carriage with him. In that case the jury had found the plaintiff guilty of negligence, but it was apparently only neglecting to get back into the carriage in which his portmanteau had been placed. In that case Mr. Justice Willes, who delivered the judgment of the court, pointed out the distinctions of fact which exist between luggage carried in the ordinary luggage van under the immediate and exclusive control of the company, and articles placed by a passenger, or at his request, in the carriage wherein he is to travel, and showed that his opinion was that the company are not liable as absolute insurers of articles so placed, but

(1) Law Rep., 1 Q. B., 54.

(2) 7 C. B., 839; 18 L. J. (C.P.), 251.

(3) 16 C. B., 13; 24 L. J. (C.P.), 137.

(4) Law Rep., 6 C. P., 44, at p. 49.

(5) Law Rep., 6 C. P., 44.

are only liable in the event of negligence of some part of the duty which pertained to them.

Under these circumstances, we are of opinion that this court is not bound by the authorities to decide that the company are liable, if in the opinion of the court the company cannot on principle be held to have undertaken the liability of common carriers in respect of the plaintiff's bag, that is, to have contracted to become insurers of it.

For the reasons above stated, we are of opinion that they did not so contract, and that the judgment in favor of the company should be affirmed.

*Judgment affirmed.*

Solicitors for plaintiff: *William A. Crump & Son.*

Solicitor for defendants: *S. Corpe.*

A railroad company is not responsible for baggage never delivered to it but retained by the passenger in his own custody and possession: *Weeks v. New York, etc.*, 9 Hun, 671, 72 N. Y., 51.

A ferryman is not liable for the property retained by a passenger in his own custody and under his own control, and lost without negligence of the ferryman: *Dudley v. Camden, etc.*, 42 N. J. L., 25, 36 Am. R., 501, 504 note.

A railroad company is not liable for money of which a passenger is forcibly robbed by strangers entering its cars: *Weeks v. New York, etc.*, 9 Hun, 669, 72 N. Y., 51.

See 29 Eng. Rep., 776 note.

Where a coat belonging to a passenger was not delivered to the railroad company, but the passenger, having placed it in the seat of the car in which he sat, forgot to take it with him when he left, and it was stolen; held, the company was not liable: *Tower v. Utica, etc.*, 7 Hill, 47.

See *Ball v. New Jersey, etc.*, 1 Daly, 495.

See *Morris v. Third Av., etc.*, 1 Daly, 203, where a satchel so left came to the possession of one of the company's agents and was delivered to the wrong person.

The plaintiff was travelling with other passengers in a carriage of a railway company, and, on the tickets being collected, there was found to be a ticket short. The plaintiff was charged by the collector with being the defaulter, and on his refusing to pay the fare or

leave the carriage he was removed from the carriage by the officers of the company without any unnecessary violence. It turned out that the plaintiff had a ticket, and he brought an action for the assault, against the company, laying, as special damage, the loss of a pair of race-glasses, which he had left behind him in the carriage when he was removed. There was also a count in trover; but there was no evidence that the glasses had come to the possession of any of the company's servants. Held, that the plaintiff could not recover for the loss of the glasses: *Glover v. London and South Western R. Co.*, L. R., 3 Q. B., 24.

Where a passenger's baggage is at his request placed by a railway company's servants in the carriage in which he is travelling, the company's contract to carry it safely is subject to an implied condition that the passenger takes ordinary care of it, and if his negligence causes its loss, the company is not responsible.

A passenger, whose portmanteau had been placed at his request in the carriage with him, got out at an intermediate station on his journey, and having negligently failed to find the same carriage again, finished his journey in a different one; the portmanteau having been robbed during the latter part of the journey by persons in the carriage, without any negligence of the railway company: Held, that the railway company was not responsible for the loss: *Tulley v. Great Western, etc.*, L. R., 6 C. Pl., 44.

1878

Berghelm v. Great Eastern Railway Co.

A railroad corporation is responsible for an article of personal baggage kept by a passenger exclusively within his own control, which is lost through the negligence of the corporation or its servants, and without fault of the passenger.

A passenger on a railroad, on leaving the car in which he was travelling, at a station, for the purpose of getting his dinner, inquired of an employe in the car whether his baggage would be safe if left in the car, and was told to leave it there, that it would be perfectly safe. He left his baggage in the car, and, on his returning, found that the car had been detached from the train, and his baggage removed to another car, where he could have a seat. On going to this car, he found only part of his baggage. No notice of the change had previously been given to him. Held, that this evidence would warrant a finding that the missing baggage was lost through the negligence of the railroad corporation.

If a person who has made a contract with a railroad corporation for his personal transportation from one place to another takes a seat in a sleeping car, and there loses an article of personal baggage through the negligence of a person in charge of the car, and without fault on his own part, it is no defence to an action against the corporation that the car was not owned by the defendant, but by a third person, who, by a contract with the defendant, provided conductors and servants, in the absence of evidence that the plaintiff had knowledge of these facts: *Kinsley v. L. S. and M. S. Railroad Co.*, 125 Mass., 54, 28 Am. R., 200, 202 note.

See *Thorpe v. N. Y. Cent. R. R.*, 76 N. Y., 402.

The proprietor of a sleeping car is not liable for property of the guest not given into the care of one of his employes, but stolen from it: *Welch v. Pullman, etc.*, 17 Abb. (N.S.), 352; *Blum v. Pullman*, 3 Cent. L. J., 591, 13 Alb. L. J., 221, 1 Flippen, 500; *Pullman, etc. v. Smith*, 73 Ills., 360; *Welding v. Wagner*, 1 City Courts Rep., 66.

Though such company is bound to the exercise of reasonable care, and to protect the property of a passenger, and if property be lost for want of such care, it is liable: *Palmater v. Wagner*,

11 Alb. L. J., 149; *Blum v. Pullman, etc.*, 13 id., 221, 3 Cent. L. J., 591, 1 Flippen, 500.

But see *Pullman, etc. v. Smith*, 73 Ills., 360.

The price paid by a passenger on a steamboat usually includes the charge for the transportation of his baggage; and as the carrier must provide some one to care for it, that person is the agent of the carrier, although he be not one of the crew or paid by the carrier, but a porter, who receives his compensation from the passenger: *Perkins v. Wright*, 37 Ind., 27.

The owner of a steamship carrying passengers is not an innkeeper, although the passenger pays a round sum for transportation, board and lodging. Such owner is not therefore liable for a watch stolen from under the passenger's pillow or in a pocket of his clothing hanging near him: *Clark v. Burns*, 118 Mass., 275, 19 Am. R., 456, 458 note.

An ocean steamship company is not responsible as a common carrier or an innkeeper for the baggage of a passenger which he keeps in his own possession in his stateroom, but must answer in such cases for its negligence like other bailees for hire.

B., a passenger on the defendant's steamship, had his baggage in his stateroom, which was kept open according to the custom of the vessel, for purposes of ventilation. The stateroom opened into a passageway, which in turn opened into the cabin. A light was always kept burning and a watchman on duty at night in the cabin. The duty of keeping watch was performed by the stewards and waiters of the vessel, and was in addition to their daily duties. The watchman on duty was required by the rules to report every hour to the officer on the bridge. B.'s two valises were stolen from his room while he was asleep. It appeared that on the night in question the watchman, when reporting at the bridge, had stopped to get a cup of coffee, and that staterooms on both sides of the cabin were robbed on the same night; there was slight evidence tending to show that the theft was committed by a passenger. In an action by B. against the company to recover the value of his baggage, the jury found a verdict for the plaintiff, subject to a reserved point as to whether

there was any evidence of negligence. Judgment was entered below on the reserved point for the plaintiff. Held (Agnew, C.J., and Paxson, J., dissenting), that there was evidence to go to the jury of negligence: *American Steamship Co. v. Bryan*, 83 Penn. St. R., 446.

The proprietor of a steamboat is liable for wearing apparel stolen from a passenger's stateroom, in the absence of negligence on his part: *Gore v. Norwich*, etc., 2 Daly, 254; *Mudgett v. Bay State*, etc., 1 id., 151.

So for a satchel taken to his stateroom by a passenger: *Macklin v. New Jersey*, etc., 7 Abb. (N.S.), 229; *Crozier v. Boston*, etc., 43 How. Pr., 466.

*Contra*: *Ring v. Steamer R. E. Lee*, 8 Amer. L. Times, U. S. Courts Rep., 168, U. S. Dist. Court, Miss., Hill, J.

Where a steamboat company had upon the boat a checkman to receive and care for baggage, and the owner of baggage, not being able to obtain a

stateroom, placed his baggage in an unlocked room, where he was told by a saloon boy it would be safe, and went away to get a trunk checked, during which his baggage was stolen: Held, he had not delivered it to the carrier so as to render it liable therefor: *Gleason v. Goodrich*, etc., 82 Wisc., 86.

Where a guest at an inn takes his goods from his room, and from the ordinary care and custody of the innkeeper, into his own exclusive custody and control and to an unusual place, and one manifestly hazardous and improper therefor, and they are lost from the inn while so in his custody, the innkeeper is not responsible for the loss: *Fuller v. Coats*, 18 Ohio St. R., 848.

For a case where a passenger's trunk was sent from steamship by a different tug from that on which the passenger was taken, and lost, and liability of the carrier, see *Tolano v. National*, etc., 5 Rob., 318.

[3 Common Pleas Division, 228.]

March 6, 1878.

[IN THE COURT OF APPEAL.]

**\*DAVIS V. THE FLAGSTAFF SILVER MINING [228  
COMPANY OF UTAH.**

*Prohibition—Inferior Court—Counter-claim beyond Local Jurisdiction—Judicature Act, 1873, ss. 89, 90.*

Under ss. 89 and 90 of the Judicature Act, 1873, an inferior court has jurisdiction to entertain a claim set up by way of counter-claim, although it is in respect of matters which arose beyond its local jurisdiction; but the power to grant relief in respect of such counter-claim is limited to the same amount which the plaintiff has claimed in the action.

ACTION brought in the Lord Mayor's Court upon two promissory notes, given by the secretary of the defendants' company, for the sums of £100 and £400 respectively.

The defendants pleaded never indebted, payment, set-off, and a counter-claim. By the counter-claim the defendants, after setting forth transactions in the United States between the plaintiff and the defendants with respect to a mine situate at Utah, claimed, *inter alia*, that certain sub-contracts executed in America should be declared to be not binding on the defendants, and that the plaintiff should be ordered to pay to them money alleged to have been there received by him on their behalf amounting to £89,000.

A summons was taken out before Field, J., to show cause why a writ of prohibition should not issue against the defendants' counter-claim and was referred by the learned judge to the court.

The plaintiff's affidavit stated that the circumstances upon which the counter-claim was founded arose without the jurisdiction of the Mayor's Court, namely, at Utah, in the United States of America, and could not be sued for in the Mayor's Court as upon an original claim.

Feb. 21. *Talfourd Salter*, Q.C., and *A. Cock*, for the plaintiff, moved the Common Pleas Division accordingly.

The Mayor's Court cannot entertain this counter-claim, it being founded on matters arising beyond the jurisdiction, 229] and it should \*therefore be struck out. By the Judicature Act, 1873, s. 89 (') an inferior court is empowered to deal with every counter-claim, subject however to the provision in s. 90 that, where any defence or counter-claim involves matter beyond the jurisdiction, such defence or counter-claim shall not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counter-claim. The power to dispose of the whole matter in controversy is limited to the demand and to the defence arising within the jurisdiction, and no

(') By the Judicature Act, 1873, s. 89, "Every inferior court which now has or which may after the passing of the act have jurisdiction in equity or in law and in equity and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

By s. 90, "Where in any proceeding before any such inferior court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, such defence or counter-

claim shall not affect the competence or duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counter-claim: Provided always, that in such case it shall be lawful for the High Court or any division or judge thereof if it shall be thought fit, on the application of any party to the proceeding, to order the whole proceeding to be transferred from such inferior court to the High Court or to any division thereof; and in such case the record in such proceeding shall be transmitted by the registrar or other proper officer of the inferior court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein."

relief can be given on this counter-claim which refers to matters beyond it.

[GROVE, J.: Must not the objection to the jurisdiction be taken in the Mayor's Court, which will presumably regard the terms of s. 90 when dealing with the counter-claim?]

That court will not entertain an objection to its jurisdiction unless made by a plea with which no other plea can be joined. \*Where a superior court is clearly of opinion, both with reference to the facts and the law, that an inferior court is exceeding its jurisdiction, it is bound to grant a writ of prohibition, *Worthington v. Jeffries* (<sup>1</sup>), and the writ may apply to so much only of the subject-matter of the controversy as is beyond the jurisdiction: *Viner's Abr.*, tit. Prohibition (E a) 3.

*Edward Clarke*, and *Grosvenor Woods*, showed cause: The Mayor's Court may, at least, entertain the whole matter in controversy, although debarred from giving relief upon the counter-claim as to matters arising beyond its jurisdiction; and this court will not assume that the inferior tribunal will infringe the provisions of the section by giving such relief if the subject of the counter-claim should appear to have arisen beyond the jurisdiction. The terms of the enactment operate as a prohibition, and no other is necessary at the present stage of the action. The plaintiff could, if he chose, apply to have the whole proceedings removed to the High Court, under the proviso in s. 90, but he wishes to try the action in a court where complete justice cannot be done unless the counter-claim is adjudicated upon. If the construction of the act be doubtful, the present motion should be refused or the rule enlarged with liberty to declare in prohibition: *Whinney v. Schmidt* (<sup>2</sup>).

[GROVE, J., referred to *Taylor v. Nicholls* (<sup>3</sup>).]

The mere suggestion that the Mayor's Court may exceed its jurisdiction is not enough to entitle the plaintiff to a writ of prohibition. The motion should be dismissed or adjourned, so as to enable the defendants to apply for the removal of the proceedings to the High Court.

*T. Salter*, Q.C., in support of the application, objected to the transfer or adjournment of the case and asked for judgment.

GROVE, J.: I am of opinion that we should not grant the prohibition. The extent to which we can exercise a discretion in refusing it is perhaps uncertain. In *Taylor v.*

(<sup>1</sup>) Law Rep., 10 C. P., 379; 12 Eng. R., 440. But see *Chambers v. Green*, Law Rep., 20 Eq., 552.

(<sup>2</sup>) Law Rep., 8 C. P., 118.

(<sup>3</sup>) 1 P. C. D., 242.

1878

Davis v. Flagstaff Mining Co.

*Nicholls* (') Brett, J., thought it "obligatory on the court to 231] grant a prohibition if it be \*clear upon the law and the facts that the inferior tribunal is proceeding without jurisdiction." The same rule was laid down in *Worthington v. Jeffries* ('), to which our attention was called during the argument for the plaintiff.

It was, for the purposes of the argument, assumed that on the claim the Mayor's Court had jurisdiction. Then the defendants set up a defence, on various grounds; and also a counter-claim, which is said to be without the jurisdiction. It is contended that as soon as we find from the affidavits that there is a counter-claim beyond the jurisdiction of the Mayor's Court, we ought to prohibit the court—not from entertaining the case altogether but—from entertaining so much of it as is without the jurisdiction. By so doing we should allow the action to proceed to a certain extent in one court, while a part of the action is reserved for litigation in a superior court, and allow the plaintiff to sue upon causes of action which are within the jurisdiction, and as to which the defendant would be undefended, because his defence might consist of matters outside the jurisdiction. This would be such an extraordinary inconvenience that the court would not sanction it, unless peremptorily obliged by law so to do. But ss. 89 and 90 of the Judicature Act, 1873, seem to me framed to prevent that injustice, so far at least as regards the counter-claim. Sect. 89 of the act enlarged the power of an inferior court by enabling it to administer relief and remedies which it could not previously afford, and to give the like effect to every ground of defence or counter-claim (subject to the provision next hereinafter contained) in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice. That certainly is not a restrictive enactment. Then follows s. 90, declaring that "where in any proceeding before any such inferior court, any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, such defence or counter-claim shall not affect the competence or duty of the court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff, and the defence thereto." I read that clause as tending to restrain the superior court from granting prohibition, because it says that although the defence and counter-claim 232] of the defendant \*involves matter beyond the jurisdiction, yet such defence shall not affect the competence of

(') 1 C. P. D., 242.

R., 440. But see *Chambers v. Green*,

(') Law Rep., 10 C. P., 379; 12 Eng. Law Rep., 20 Eq., 552.



the court to deal with the whole matter so far as relates to the demand of the plaintiff, and the defence thereto, "but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counter-claim." The court below may entertain the action and the defence—so much thereof as it has power to deal with—but it is not to grant relief beyond what it has jurisdiction to administer. So far from this being an argument for prohibiting the inferior court, it seems by enabling that court to sever what it can entertain from what it cannot, to be against the grant of prohibition which would indeed be of an unusual kind, for it would be novel practice to prohibit a portion of the defence, and not the whole action. A passage was cited from Viner's Abridgment, where it was decided that if a suit in the Ecclesiastical Court relates to the revocation of a will of both land and goods, the court may prohibit the suit in respect of the land because that is beyond the jurisdiction. That is intelligible enough, for there were virtually two separate suits, over one of which the Ecclesiastical Court had no jurisdiction. Very different is the present case, where we are asked to prohibit not the action but the defence only, and to prevent the Mayor's Court dealing with the defence in any way, and ascertaining upon the facts whether any or what part of it is within the jurisdiction, or whether the tribunal has power to try it. It seems to me that the section is so framed as to expressly provide for such a case as this, and my opinion is confirmed by the proviso that "it shall be lawful for the High Court, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred." If prohibition in respect of part of the proceedings had been contemplated, the terms used would surely have been "the whole or any part" of the proceedings. I think that the use of the word "whole" shows that the power given is to transfer not a part, but the whole proceeding. Upon my construction of the section I think that we have not power to grant the present application.

LINDLEY, J.: I am of the same opinion. The question seems \*to turn on the true construction of ss. 89 and [233 90. One object of part vi, of the Judicature Act, 1873, was apparently to enable courts of inferior jurisdiction to do complete justice in actions intrusted to them, or in respect of which they had originally jurisdiction; and I think s. 89 was framed to enable that to be done by the inferior court which can be done under ss. 24 and 25 by the superior court; that is, to enable a party to set up in the inferior

1878

Davis v. Flagstaff Mining Co.

court whatever answer he may have. This would render it necessary to provide for counter-claims, founded on matters with respect to which the court of inferior jurisdiction had no power to deal. That is provided for in s. 90 thus: It contemplates a state of things like the present, viz., an action properly brought in an inferior court, and a defence of matters not properly triable in that court. "Where in any proceeding before any such inferior court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, such defence or counter-claim shall not affect the competence or the duty of the court to dispose"—not merely of the claim, but—"of the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto." Stopping there, the section means that, if a person chooses to bring an action in an inferior court, he must be prepared to meet defences which could not be made the subject of an action in the court itself; or, in other words, that by selecting an inferior court the plaintiff cannot deprive the defendant of defences which he could not assert there. It would be unjust if such an advantage could be obtained over the defendant. I think the section is directed against that very state of things. It says that although the inferior court shall, as regards a defence involving matters beyond the jurisdiction, entertain it so far as may be necessary to defeat the claim, an inferior court is not to go further and to grant relief exceeding that which the court has jurisdiction to administer "to the defendant upon any such counter-claim." Apply that to the present case. The plaintiff sues for £500, the defendant sets off a counter-claim of, say £80,000: perhaps this court could, if it should think fit, grant a prohibition as to the difference, which would be no more than merely repeating in the form of a writ of prohibition what the statute itself [234] says. It is not necessary to \*decide whether such prohibition could or could not be granted, for the plaintiff does not ask for it. But that seems to me the utmost that could be done. I think this application should be dismissed with costs. It is quite obvious that this action should be transferred to the superior court.

*Application dismissed.*

March 6. The plaintiff appealed.

*Talfourd Salter*, Q.C., for the plaintiff.

*E. Clarke*, and *Grosvenor Woods*, for the defendants.

BRETT, L.J.: I am of opinion that this judgment should be affirmed.

The plaintiff has made a claim in the Mayor's Court in a matter over which it is admitted the Mayor's Court has jurisdiction. To that claim the defendant has pleaded certain defences, and also set up a counter-claim. In considering the affidavit which has been made and which is not answered, I have come to the conclusion that the subject-matter of the counter-claim is in respect of matters which happened out of the jurisdiction of the Mayor's Court, and could not have been sued for in that court as upon an original claim. Then the question is whether the Mayor's Court should be prohibited from entertaining any question arising on the counter-claim. That depends upon the construction of the Judicature Act, 1873. I think the object of the Judicature Acts was to enable the court, before which any controversy was brought, to determine all the matters, which at that time might be existing between the parties, and that every enactment of the Judicature Acts, and every part of the rules made under those acts, are always to be construed having regard to that fundamental object.

Sect. 89 of the act of 1873 deals, amongst other things, with admiralty jurisdiction given to an inferior court. Now in the Admiralty Court (which although in one sense a superior court, yet was a court with a limited jurisdiction) at the time of passing of the Judicature Act, where the plaintiff's matter of controversy was within the jurisdiction of the Admiralty Court, and the defendant's part of the matter of controversy involved matter beyond its jurisdiction, if in order to do equity between the parties it was necessary \*to entertain matters of controversy [235 brought forward by the defendant, which if they had been brought forward by the defendant as a plaintiff could not have been entertained, but having been brought forward by him as a defendant they ought to be entertained, in order that equity might be done between the parties, the rule of law was that the Admiralty Court exercised jurisdiction over those matters. That being the rule of law in the Admiralty Court, it seems to me, having regard to the fundamental object of the statute, that the Legislature by s. 89 meant to give to inferior courts a power similar to that which the Admiralty Court had acted upon under like circumstances, and therefore that the meaning of that section is that where a plaintiff in an inferior court brings an action which is within its jurisdiction, and the defendant brings forward a defence or a counter-claim, which if it had been brought forward as an original claim by the defendant could not be entertained for want of jurisdiction of the inferior

1878

Davis v. Flagstaff Mining Co.

court, yet in order that the inferior court might give a final decision in all matters in controversy between the parties and do equity between them, that court shall have jurisdiction to entertain the matters brought forward by the defendant as a defence or by way of counter-claim. The words of s. 89 are most extensive; that section says "every inferior court shall, as regards all causes of action within its jurisdiction, have power to grant, and shall grant in any proceedings before such court, such relief, redress, or remedy as might or ought to be done in the like case by the High Court of Justice." But then it goes on, "and shall in every such proceeding," that is, in every case where a cause of action by the plaintiff is within its jurisdiction, "give such and the like effect to every ground of defence or counter-claim equitable or legal (subject to the provisions next hereinafter contained) in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." If the phrase "subject to the provision next hereinafter contained" were omitted, that section would enable the inferior courts to give effect to every ground of defence or counter-claim in as full and ample a manner as might be done by the High Court of Justice. Therefore, where the plaintiff's cause of action was within the jurisdiction of the inferior court that section would remove all barriers of jurisdiction \*in regard to defences or counter-claims, and would leave the inferior courts, with regard to defences and counter-claims, free to exercise all the jurisdiction of the superior courts. But that extensive power of dealing with the ground of defence or counter-claim is "subject to the provision next hereinafter contained;" we must therefore refer to s. 90 to ascertain to what extent this extensive power is limited. Now s. 90 says: "When in any proceeding before such inferior court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court"—thereby showing the intention of the former section that such counter-claims, namely, those which should involve matter beyond the jurisdiction of the court, should be entertained—"such defence or counter-claim"—that is, one which involves matter beyond the jurisdiction of the court—"shall not affect the competence or the duty of the court to dispose of the whole matter in controversy." So far it certainly enacts that the competence of the court shall not be affected to deal with a counter-claim which involves matter beyond the jurisdiction of the court. I think the whole matter in controversy must contain both the demand and that which is the defence proper to the demand and the

counter-claim. They are all in controversy, therefore the "whole matter in controversy" contains them all. But that phrase, "the whole matter in controversy," comes now to be limited, "so far as relates to the demand of the plaintiff and the defendant and the defence thereto." It is true that those words create a difficulty, because the words "the defence thereto" might be construed so as to be limited only to a defence and not to include a counter-claim. But having regard, as I said, to the fundamental object of the Judicature Act, which is to give complete redress, at all events between the litigants with regard to all matters in controversy between them, it seems to me that we ought not to construe "the defence thereto" to be confined to a defence proper, such as might have been a defence in cases where no counter-claim was allowed before the present legislation, but that the words "defence thereto" include a counter-claim, so far as the counter-claim can be used under the recent legislation as a defence to a claim. Then the section enacts in what respect the inferior court shall have no jurisdiction; "but no relief exceeding that which the \*court has [237 jurisdiction to administer shall be given to the defendant upon any such counter-claim." My construction of those words is, that the inferior court may deal with the counter-claim, which, if it were an original claim, would be beyond its jurisdiction, to the extent of answering the claim of the plaintiff, but not further.

It has been said that "the matter beyond the jurisdiction" is confined only to amount; but I cannot think so. The matter may be beyond the jurisdiction of the inferior court in respect both of amount and locality. The jurisdiction of an inferior court may be limited in amount, but it is always limited with regard to locality; and it seems to me that it would be defeating the object of this section, and the fundamental object of this legislation, if we were to say that the inferior court might deal with a counter-claim which was beyond its jurisdiction in amount, but might not deal with a counter-claim which was beyond its jurisdiction in locality. A counter-claim might be beyond the jurisdiction of the inferior court because some of the facts with regard to it, which must be proved in order to support it, might have arisen outside the locality of the jurisdiction. But it was never meant to confine the power of the inferior court to deal only with those matters which are within the limits of its local jurisdiction. It was meant to give power to the inferior court to deal to the extent I have said with all matters of counter-claim, whether they are beyond its jurisdic-

1878

Davis v. Flagstaff Mining Co.

tion in respect to amount, or whether they are beyond its jurisdiction in respect of locality, or both. That being so, where the counter-claim is pleaded, if it is shown that that counter-claim if treated in a superior court might give rise to a decree in favor of the defendant, then if that counter-claim is beyond the jurisdiction in other respects, s. 90 limits the power of the inferior court to entertain it only so far as it is a defence to the demand. This construction gives effect to all the words of both sections. But then, considerable injustice might be done in such a case as the present. If the inferior court were entitled to deal absolutely with this counter-claim, even to the extent to which I have limited it, great hardship might arise, for it might not be possible to try the action without a commission to Utah. The Mayor's Court has no power to grant a commission for the examination of witnesses. If there were no remedy, great injustice 238] \*might be done; but there is a remedy, for where a counter-claim is beyond the jurisdiction of the court, in the sense in which I have been speaking, the High Court may remove the whole subject-matter of the litigation before itself; and then it will have all its powers of dealing with it. So that in the present case I have no doubt, at some stage of the proceedings, the High Court will remove the whole matter. But Mr. Salter asks us to say that the Mayor's Court should have power to retain the claim, and should not be able to entertain the counter-claim to any extent; but that the defendant should sue for the amount of his counter-claim in the superior court: to that we cannot accede. The application is for a prohibition against the Mayor's Court entertaining the counter-claim, and such an application cannot be granted.

With regard to the proper time for removing the cause from the Mayor's Court into the High Court, we are not called upon to express any opinion.

I am of opinion that the judgment ought to be affirmed.

COTTON, L.J.: I am also of opinion that the appeal must fail. The counter-claim raises questions which, if they had been made the subject of a claim by the defendant against the plaintiff by original action, the Mayor's Court would have had no jurisdiction to entertain. The only question is, whether ss. 89 and 90 of the Judicature Act, 1873, give the Mayor's Court power to enter into the subject-matter of the counter-claim, and if so to what extent. Section 89 deals with two matters. It deals with the relief to be granted to a plaintiff in an inferior court, if that court has jurisdiction to entertain the action independently of the Judicature

Act, 1873. It also gives rights to the defendant. The words are, "shall give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." Nothing is said as to defence or counter-claim arising without the jurisdiction, but the words are general. I think the fair construction of that part of the enactment is, that if a defendant has been brought into an inferior court then he may raise any matter of defence or counter-claim which he could have raised if the action \*had been originally commenced in the High Court. [239 That extensive right is limited by the words "subject to the provision next hereinafter contained." That provision is contained in s. 90. The words at the beginning of that section strongly show that counter-claims, which can be entertained under the previous section, may involve matter beyond the jurisdiction of the inferior court; it does not say that the counter-claim shall not be entertained, but it provides that "such defence or counter-claim shall not affect the competence or duty of the court" to do what? "to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto." The whole difficulty arises upon the use of the word "defence," because while "defence" only is mentioned in the latter part of this clause, in the previous part the words are "the defence or counter-claim;" but I think it would be wrong to give to the words "the whole matter in controversy," the limited construction "to dispose of the claim and the defence thereto." The whole matter in controversy is to be disposed of, and that referring to the previous part of the section may be matter beyond the jurisdiction of the court. I think that the inferior court has jurisdiction to enter into all the matters involved both in the claim and counter-claim, though in the counter-claim there may be matters beyond the jurisdiction of the court, to see whether the plaintiff has a good demand, and if he has, whether by means of the counter-claim, the defendant can protect himself effectually against that demand. Then there comes a limitation, "but no relief can be given." That is to say, no judgment shall be given to the defendant on matters beyond the original jurisdiction of the court. The defendant is to use the counter-claim as a shield, but not so as to enable him by means of a judgment to obtain payment of a sum of money beyond the amount of the plaintiff's claim.

On the application of either party, the court may transfer

1878

Davis v. Flagstaff Mining Co.

the whole proceeding to the High Court, and there, not only the plaintiff's claim and the defendant's counter-claim, but the whole matter in controversy, will be dealt with, and the court will give the plaintiff or the defendant such a judgment or decree as in justice either party may be entitled to. I am of opinion that the prohibition ought not to issue, and the appeal should be dismissed.

240] \*THESIGER, L.J.: I am of the same opinion. The construction of s. 90 of the act of 1873 appears to be in itself perfectly plain. And when it is read in connection with the preceding section, and also with one of two other sections of the Judicature Act of 1873, its construction is free from doubt.

Prior to the Judicature Acts there were a variety of claims, although resulting in the payment from one party to another of a sum of money, which could not be made the subject of set-off, and the courts were precluded from doing complete justice between two parties in a particular litigation. That difficulty was removed by the passing of ss. 24 and 25 of the Judicature Act, 1873, for by those sections every division of the High Court was enabled to do complete justice as regards all claims which might exist between the actual parties to a litigation, and, under certain circumstances third persons might be brought in as parties to the action; and amongst other things, in addition to a set-off as it existed before the passing of the Judicature Acts, a defendant was entitled to set up claims, although sounding in damages and not actually constituting a legal defence, so that such claims might be treated with regard to the judgment as a set-off to the plaintiff's claim: a further machinery is provided by Order XIX, Rule 3, by which a defendant may set up by way of counter-claim against the claim of the plaintiff any right or claim, whether sounding in damages or not, and such counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the court to pronounce, not two judgments, but a final judgment both on the original and on the cross claim.

That being the state of the legislation under the Judicature Acts, so far as regarded the proceedings of the High Court, the Legislature had to deal with courts of inferior jurisdiction, and it dealt with them under ss. 89 and 90. Sect. 89 contains a general provision, first, as regards causes of action; and, secondly, as regards defences or counter-claims. As regards causes of action, the jurisdiction is limited to the inferior court according to the locality, or according to the amount, as it existed prior to the passing of



the Judicature Acts; but subject to that limitation power is given to the court to deal with those causes of action "in as full and ample a manner as might and ought to be done in the \*like case by the High Court of Justice." [241] Then the Legislature had to deal with the question of defence and counter-claim; and, reasoning *a priori*, I think anybody who had dealt with the subject, and had observed the mode in which the Legislature had dealt with judicial proceedings in the High Court, would say that, if a plaintiff chose to bring his action in an inferior court, justice would require that the defendant in that action should be entitled to set off, at all events, to the extent of the plaintiff's claim, any demand which the defendant might have, wherever or however that demand might have arisen; otherwise a plaintiff might be enabled by choosing a particular court to obtain speedily a judgment involving the payment of money by a defendant, while at the same time the defendant might have a very much larger claim which he could only sue for in a superior court. That case is provided for by s. 89 in general terms: in every such proceeding the inferior court shall give such and the like effect to every ground of defence or counter-claim. I think it is clear, when we come to the reading of s. 90, that "every ground of defence or counter-claim" is intended to mean what the words themselves in their natural import do mean, namely, every ground of defence or counter-claim, in whatever locality it may have arisen, or under whatever circumstances it may have arisen. Then it was felt that some limitation must be put on these general terms, otherwise it would be raising the jurisdiction of the inferior court to an extent beyond what the convenience of the public would require, and accordingly we find the limitation "subject to the provision next hereinafter contained." Looking to the object which would necessarily be had in view, we would expect to find that s. 90 would at all events go to this extent, namely, would enable the defendant to set up, by way of counter-claim or set-off, so much of any demand he might have as would be equivalent to the amount claimed by the plaintiff. It seems to me that s. 90 provides in clear terms for that, because it says "where in any proceeding before any such inferior court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court"—it is dealing therefore not merely with a defence involving matter beyond the jurisdiction of the court, but also a counter-claim involving matter beyond the jurisdiction of the court—"such defence or \*counter-claim," namely, the defence or counter- [242]

claim involving matter beyond the jurisdiction of the court "shall not affect the competence or duty of the court to dispose of" what? not the mere plaintiff's claim, but "the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto."

I agree with what has fallen from Lord Justice Brett as to the meaning of the word "defence." I agree that the word "defence" does not limit the words used in the earlier part of the section. I think that there is a reason which distinctly points to that being the correct view. When the Legislature are dealing in this section with the counter-claim or defence, which is mentioned in the earlier part of the section, we find the word "such" before defence, but in this latter part the words are "to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto." Thereby the Legislature use words which are very comprehensive to show that they intended to deal with the whole matter to a certain limited extent as regards amount, namely, as regards the amount of the claim of the plaintiff. I think the words which follow, "but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counter-claim," merely mean this: as soon as a judgment is obtained by the defendant of sufficient amount to overtop or rather equal the claim of the plaintiff, then if the counter-claim is *prima facie* beyond the jurisdiction of the court, the court shall hold its hand, and as regards the overplus of the counter-claim, that must be dealt with by some other court. That being so, although in this case the counter-claim which is set up and the relief which is asked for is of a larger amount than that which would be sufficient to equal the claim of the plaintiff, yet that would not justify an application for a prohibition. The court in giving judgment would have to give special relief to the defendants as regards their counter-claim, at all events to the extent necessary to equal the plaintiff's claim. Until the Mayor's Court has shown by some act that it is exceeding its duty or jurisdiction, the plaintiff has no ground of complaint.

I am of opinion that in this case there is nothing in the course of conduct pursued by the defendants in the Mayor's 243] Court which \*would justify an application for a prohibition at this stage of the proceedings.

*Appeal dismissed.*

Solicitor for plaintiff: *Sykes.*

Solicitors for defendant: *Ashley & Tee.*

1878

Union Bank of London v. Lenanton.

[3 Common Pleas Division, 243.]

Feb. 6, 1878.

[IN THE COURT OF APPEAL.]

## THE UNION BANK OF LONDON V. LENANTON.

*Shipping—Transfer—Assignment—British Ship built in order to be sold to Foreigner and to be delivered at Foreign Port—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 7—Merchant Shipping Acts, 1854, 1862 (17 & 18 Vict. c. 104), ss. 19, 55, 57; (25 & 26 Vict. c. 63), s. 3.*

A ship built in order to be sold to a foreigner, and to be delivered to him at a foreign port, was assigned by her builder to the plaintiff for a valuable consideration, under an agreement which was not in the form of a bill of sale given by the Merchant Shipping Act, 1854. The assignment was not registered, either under that act or under the Bills of Sale Act, 1854. At the time of the assignment the vessel had been completely built and had been tried:

*Held*, that the ship was not a British ship within the meaning of the Merchant Shipping Act, 1854, and that an assignment of her need not be by bill of sale, nor registered under that statute.

*Held*, also, that an assignment of her fell within the proviso in the Bills of Sale Act, 1854, s. 7, which exempts assignments of a ship from the operation of that statute.

INTERPLEADER issue, to try the right of the plaintiffs as against the defendant in the ship Edhem.

At the trial at the Middlesex sittings on the 7th and 11th of June, 1877, before Pollock, P., without a jury, the following facts were proved: John and William Dudgeon formerly carried on business in partnership as shipbuilders in London and at the Sun Ironworks at Millwall and Cubitt Town. On the 9th of January, 1873, J. Dudgeon, on behalf of his firm, entered into a contract with certain persons on behalf of the Turkish Azizié Steamship Company for the construction of two steamships for £31,250, payable by instalments; the ships to be delivered to the representatives of the Turkish company at the Golden Horn. The ships were built, and one of them delivered pursuant to contract; the other, called \*Edhem, was held by J. & W. Dud- [244] geon by way of security and lien for the payment of a final instalment of £7,000, and remained in their shipping yard at Cubitt Town.

On the 1st of April, 1875, W. Dudgeon died, having by his will appointed J. T. Donald his executor.

By an agreement dated the 21st of May, 1875, between John Dudgeon and the Union Bank of London (the plaintiffs), which recited that in consideration of £28,000 advanced by the bank to John and William Dudgeon, John Dudgeon had agreed to charge all the estate and interest of the firm in (amongst other things) the steamship Edhem

1878

Union Bank of London v. Lenanton.

with the repayment of the sum of £28,000; and that the ship was built under a contract, and the firm had a lien upon the ship in respect of a sum of £7,000 then due to the firm, it was agreed that for the purposes of such confirmation and security, and in consideration of £7,000 part of £28,000, the right, interest, and lien of himself, J. Dudgeon, or of the firm of John & William Dudgeon, should remain and be held as a security for the payment to the bank by John Dudgeon, or the firm of J. & W. Dudgeon, of the sum of £7,000 and interest thereon; and J. Dudgeon did charge all the right and interest of himself and of the firm of J. & W. Dudgeon in the ship with the payment to the bank of the sum of £7,000 and interest thereon, and did also agree, upon the request of the bank, to execute any such assurance of the ship and of the sum of £7,000 and interest, in such manner as the bank might require, for further securing the payment of the money.

On the 10th of November, 1875, the assets of J. & W. Dudgeon not being sufficient to meet their creditors, Robert Fletcher was appointed receiver, and entered into possession of the estate and effects of J. Dudgeon and J. & W. Dudgeon. On the 5th of January, 1876, John Dudgeon was found and declared to be a person of unsound mind, and by an order of the Lord Chancellor, dated the 21st of February, 1876, A. J. Dudgeon, L. Dudgeon, and R. Fletcher were appointed committees of his person and estate. On the 24th of June, 1876, an agreement was made between the committees of the lunatic, Donald the executor of W. Dudgeon, and the plaintiffs' bank, by which the creditors of J. Dudgeon would be paid 3s. 4d. in the pound upon their 245] respective debts; and, \*amongst other things, the committees and the executor should absolutely assign to the bank all the interest of them or either of them, J. Dudgeon or the estate of W. Dudgeon, in the ship Edhem, and in all payments and moneys which might be received or recovered in respect of the ship from the Turkish company. On the report of the Master in Lunacy this agreement was confirmed and approved of by the Lord Chancellor. On the 22d of August, 1876, the plaintiffs' bank took possession (amongst other things) of the ship Edhem. On the 13th of September the sheriff levied under a *fi. fa.* issued on a judgment signed in an action of *Lenanton* (the defendant in the present interpleader) v. *Dudgeon*. The sheriff's officer seized, amongst other things in the shipping yard at Cubitt Town, the ship Edhem. The ship was completely built and had been tried. The agreement of the 21st of May, 1873, had

not been registered under the Bills of Sale Act, nor had the ship *Edhem* been registered under the Merchant Shipping Act, 1854.

At the close of the case it was contended, on behalf of the defendant, that the ship *Edhem* was a British ship, and the document dated the 21st of May, 1875, was an assignment of her, which must be registered either under the Bills of Sale Act, or under the Merchant Shipping Act, 1854<sup>(1)</sup>, and that, therefore, no property in the ship passed to the plaintiffs.

\*It was contended on behalf of the plaintiffs that [246 they had a good title to the ship *Edhem* under the documents of the 21st of May, 1875, and the 24th of June, 1876, which was a parol arrangement under sanction of the Court of Chancery; and that no registration was required.

The learned judge, after argument, directed judgment to be entered for the plaintiffs. The defendant appealed.

Feb. 5. *Butt*, Q.C., and *Witt*, for the defendant.

Feb. 6. *Holl*, Q.C., and *Aspinall*, for the plaintiffs.

(1) By the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, every bill of sale of personal chattels shall be void unless the same be filed in the manner pointed out in that section.

By s. 7, the expression "bill of sale . . . shall not include the following documents . . . transfers or assignments of any ship or vessel, or any share thereof. . ."

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 19: "Every British ship must be registered in manner hereinafter mentioned, . . . and no ship hereby required to be registered shall, unless registered, be recognized as a British ship; and no officer of customs shall grant a clearance or transire to any ship hereby required to be registered for the purpose of enabling her to proceed to sea as a British ship, unless the master of such ship, upon being required to do so, produces to him such certificate of registry as is hereinafter mentioned; and if such ship attempts to proceed to sea as a British ship without a clearance or transire, such officer may detain the ship until such certificate is produced to him."

By s. 55: "A registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to

identify the ship to the satisfaction of the registrar. . . ."

By s. 57: "Every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee; and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale, and shall indorse on the bill of sale the fact of such entry having been made, with the date and hour thereof; and all bills of sale of any ship or shares in a ship shall be entered in the register book in the order of their production to the registrar."

By 25 & 26 Vict. c. 63, s. 3, it is declared that the expression "beneficial interest," whenever used in the second part of the principal act, includes interests arising under contract or other equitable interests; and the intention of the said act is that . . . without prejudice to the provisions contained in the said act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property.

1878

Union Bank of London v. Lenanton.

COCKBURN, C.J.: The instrument of the 21st of May, 1873, professes to be an assignment, and is an agreement in the nature of a bill of sale; but it has not been registered under the Bills of Sale Act (17 & 18 Vict. c. 36), and if it came within that act then the assignment would be bad for want of registration. But I think the exception in the Bills of Sale Act clearly shows that the statute was not intended to apply to a ship.

Then comes the question whether the ship *Edhem* was a vessel which required to be registered under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), as a British ship; and if so, whether, not being registered, an agreement purporting to pass the property in the vessel is sufficient. I confess I had some doubt, whether, although the act of Parliament expressly requires that a British ship shall be registered, and then goes on to deal with the mode of passing property in a British ship so registered upon sale, before you can pass the property in such ship, you must necessarily register her with a view to bring her within the operation of s. 57, which requires the transfer of a registered ship to be registered. But I do not think it necessary to decide this case on that ground. I do not think that this was a British ship within the contemplation of the act of Parliament. She was built, it was true, by a British subject, and on looking at the contract between the British builder and the foreign purchaser for the construction and transfer of the vessel, it appears to me impossible to say that the property in the ship was to pass from the builder to the foreign purchaser, until she was actually delivered at the spot where by the contract the delivery to the Turkish company was to take place. It was specially provided that the Turkish company should have the ship delivered at a particular place for a certain sum of money. Being till delivered the property of a British owner, she was in a certain sense a British ship; but I cannot think that she was a British ship within the contemplation of the statute. The statute was intended to apply to ships intended to be the property of a British owner. That was not the case here. As soon as the vessel crossed the sea she was intended to be transferred to a foreign owner, and never intended from that hour to be a British ship. Therefore, although she was a British ship in the larger sense of the term, I do not think she comes within the act of Parliament which has reference to British ships.

I therefore think the judgment of Pollock, B., was right, and must be affirmed.

BRAMWELL, L.J.: I am of the same opinion. I have no doubt that the property in an unregistered ship may pass otherwise, and indeed must pass otherwise, than by the bill of sale required by the Merchant Shipping Act, 1854. The 17 & 18 Vict. c. 104, s. 19, says: "Every British ship must be registered in manner hereinafter mentioned unless," &c.; this is not a case within the exception. If those words stood alone there might be an obligation upon the owner of \*a British ship to have her registered, but that is [248 not so, because certain consequences follow from the omission, but there is no penalty imposed for not doing it; that is to say, a person is not punished, or sent to prison, or indicted for omitting to register. "No ship hereby required to be registered shall, unless registered, be recognized as a British ship, and no officer of customs shall grant a clearance." The consequence of not registering is, that the owner does not get the benefits of his British ownership. Sect. 55 does not say "no ship or share therein shall be transferred except by bill of sale," but a registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale." That is only applicable where the ship is a registered ship. This was not a registered ship. Even if there was an obligation to register—and I think it is clear that there was not—the statute does not say, because the obligation has not been observed, the ship may not be assigned. It must also be remembered that this enactment is one piece of legislation, for it proceeds<sup>(1)</sup>: "Every bill of sale for the transfer of any registered ship, or for any share therein, when duly executed shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee; and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale, and shall indorse the fact of such entry having been made . . . and all bills of sale of any ship or shares in a ship shall be entered in the register book in the order of their production to the registrar." I incline to think that the consequence of not producing the transfer is that a subsequent transferor or incumbrancer takes precedence—whoever gets first on the register takes precedence. Messrs. Dudgeon, therefore, were not bound to register the ship Edhem, and the consequences of their not doing so are those I have mentioned. Further, there is no absolute prohibition of the assignment other-

(<sup>1</sup>) Sect. 57.

1878

Union Bank of London v. Lenanton.

wise than by bill of sale, because that is applicable only to registered ships, and there is no prohibition of the assignment, if unregistered, for the reason I have already mentioned. I have also to remark that the plaintiffs would 249] \*be entitled to an equitable interest in this ship without registration.

It was also contended that the assignment of the ship was void under the Bills of Sale Act, and we are asked to read the enactment in the Bills of Sale Act as though it had in it the words "transfer or assignment of a ship pursuant to the Merchant Shipping Act." I am of opinion that we cannot so read it. It is difficult to say why we cannot, except to say that no reason has been given why we should. It is said that the words used are similar to those used in the Merchant Shipping Act. That is true; but the words in the Bills of Sale Act are general words, and such as a person would use who intended to frame a wide and comprehensive enactment.

I am of opinion that the judgment should be affirmed.

BRETT, L.J.: I am of opinion that the property in the ship passed to the plaintiffs. She was a ship whose construction was completed. She belonged solely to British owners, but it never was intended that she should be registered as a British ship. I therefore agree with my Lord Chief Justice, that not being intended to be ever registered she was not a ship which was brought within the Merchant Shipping Act, 1854. But supposing that argument not to be sufficient, in point of fact she was not registered; and I think that the only transfer to which the prohibition of the Merchant Shipping Act relates is a transfer of a registered ship. If it were not for the statute no registration of the transfer would be necessary, and the transaction which would otherwise be good, but which is forbidden by s. 55 of the Merchant Shipping Act, is the transfer of a registered ship. Therefore, it seems to me that this transaction was not made void by reason of the Merchant Shipping Act, 1854.

Then it is said the transfer is not available by reason of the Bills of Sale Act. If the Bills of Sale Act has been conterminous with the Merchant Shipping Act, so that it could be said that a ship which is not to be dealt with under the Merchant Shipping Act must be dealt with under the Bills of Sale Act, then the ship would come within the provisions of the Bills of Sale Act. But the Bills of Sale Act is not conterminous with the Merchant Shipping Act. 250] \*The Bills of Sale Act excepts all ships, that is,



whether British ships or foreign ships, or whether registered ships or not registered ships. Therefore, although the ship is not registered, and although the transfer is not within the Merchant Shipping Act, yet it is a ship, and is excepted from the Bills of Sale Act; therefore a ship not registered is a thing the transfer of which is not dealt with either by the Merchant Shipping Act, or the Bills of Sale Act, and therefore the transfer is governed by the common law, and is good although there has been no registration. The appeal must fail, and the judgment should be affirmed.

COTTON, L.J.: I am of opinion that the appeal must fail. I think, putting aside the Bills of Sale Act, the bank had a good and valid title to the ship. The instrument under which they claim is the agreement of the 21st of May, 1875, it recites what is supposed to be the interest of Messrs. Dudgeon, not stating that interest, in my opinion, correctly, for the agreement deals with them as having only a lien or charge upon the ship. [The Lord Justice read the operative part of the agreement.] Now, in equity that would be a good contract, not transferring the property in the ship, but giving the bank a right in equity to say that whatever interest Messrs. Dudgeon had in the ship should be transferred to them as a security for their debt. I do not propose to enter upon the question whether this is a ship which, under the Merchant Shipping Act, 1854, ought to have been transferred by a duly registered bill of sale; but in the act of 1862 (25 & 26 Vict. c. 63, s. 3), there is an express provision giving a shipowner in equity a right to transfer his interest in his ship by an instrument or contract not sufficient to pass the legal title. It is this: "Without prejudice to the provisions contained in the said act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them, in respect of any other personal property." So that independently of the question whether the *Edhem* was a British ship within the meaning of the Merchant Shipping Act (as to which I agree with my Lord Chief Justice and the other members of the court), the point as to the validity of the charge is [25] especially met by the section I have referred to. Here there was an equitable interest in the ship granted by contract to the bank by Messrs. Dudgeon: even assuming that the ship *Edhem* is a British ship, that contract would have been effectual, independently of the Bills of Sale Act, to give them a title to the ship at the time when the execution

1878

Firth v. Bowling Iron Co.

of the 13th of September was issued. Then the question still arises, does the Bills of Sale Act make that title of no effect as against the execution creditor? It would be a bill of sale within the act unless it is taken out of the act by the exception contained in the interpretation clause. Although the Bills of Sale Act in terms deals with bills of sale, assignments, and transfers, a contract effectual in equity, giving the person a right to the thing in specie, is an assignment or transfer within the meaning of the act. The exception is, "This act is not to include transfers or assignments of any ship or vessel, or any share thereof." Does this document come within that exception? I am of opinion that it does. The argument is that we ought to read those words as "transfers or assignments of any ship or vessel duly registered under the act relating to British ships;" but no such words are to be found in the exception.

My opinion, therefore, is that the bank have a good title to the ship as against the defendant.

*Judgment affirmed.*

Solicitors for plaintiff: *Lyne & Holman.*

Solicitor for defendant: *Pritchard.*

---

[3 Common Pleas Division, 254.]

March 2, 1878.

## 254] \*FIRTH V. THE BOWLING IRON COMPANY.

*Negligence—Injury to Cattle from defective and improper Fencing—Landlord and Tenant.*

The plaintiff and the defendants respectively occupied adjoining lands as tenants under the same landlord. By the terms of their lease the defendants were bound to fence the land in their occupation for the benefit of the lessor and his tenants. About twenty years ago the predecessors of the defendants had fenced their land with wire rope, and the defendants allowed this fence to remain, and from time to time partially repaired it. From long exposure the strands of the wires composing the rope decayed, and pieces of it fell to the ground and lay hidden in the grass of the adjoining pasture occupied by the plaintiff. The plaintiff's cow grazing there swallowed one of these pieces, and died in consequence:

*Held*, that the defendants were liable to compensate the plaintiff for the loss of the cow.

APPEAL from the decision of the judge of the County Court of Yorkshire holden at Bradford.

The action was brought to recover £27 16s., as damages for the loss of a cow, the property of the plaintiff, by reason of the negligence of the defendants in the use and enjoyment of their property. At the trial the following facts were proved:

1. The plaintiff at the time of the alleged grievance was, and for many years past had been, the tenant from year to year under Mr. Savile of a farm called Lower Chatt's Farm, at Hunsworth.

2. The defendants are a limited company incorporated in 1870 under the Companies Act, 1862, and prior to their incorporation their predecessors in title had for several years carried on extensive colliery and iron works, under the style of the Bowling Iron Works.

3. At the time of the alleged grievance the defendants were, and they and their predecessors in title had for several years been, the lessees under Mr. Savile of the mines of coal and ironstone underlying (amongst other lands) the farm occupied by the plaintiff. This farm contains about forty-two acres, divided into several inclosures, and used principally for pasturing milk cows.

4. In one of the inclosures (containing about ten acres of \*pasture) there is a large pit hill or bank which prior [255 to the incorporation of the defendants had been formed by their predecessors in title from the spoil obtained in sinking a coal shaft. This pit hill had been for some years, and was at the time of the alleged grievance, unused by the defendants, except that a tramway forming part of the defendants' works, and used by the defendants, ran over it.

5. By the terms of their lease the defendants were bound to protect (amongst other things) their tramways by the erection of stone walls or by posts and rails of a specified description, for the benefit of the lessor, his heirs or assigns, and his and their tenants.

6. About twenty years ago the predecessors in title of the defendants placed round the base of the pit hill a fence, constructed of two parallel lines of wire rope supported by posts. The wire ropes had originally been used for the purposes of the colliery, but owing to wear had ceased to be suitable for such purposes.

7. The defendants allowed this fence of wire rope to remain, and from time to time mended or stopped any broken places with wooden rails, and thus prevented cattle straying on the pit hill or tramway.

8. From long exposure the strands of iron composing the rope rusted, decayed, and separated into pieces, some of which fell to the ground and lay hidden in the grass of the plaintiff's pasture, and were liable to be taken up by the cattle grazing there.

9. In October, 1867, two heifers of the plaintiff died in consequence of their taking up pieces of wire with the grass

1878

Firth v. Bowling Iron Co.

while feeding in this pasture. The carcasses of the heifers were examined, and a piece of wire several inches long and in a rusted and decayed state (which no doubt had formed part of the wire rope) was found in the stomach of each of the heifers. The plaintiff complained to the landlord's agent, Mr. Lipscomb, and afterwards wrote to the defendants the following letter :

"Lower Chatt's Farm, October 10th, 1867.

"To the Bowling Iron Company,

"Gentlemen,—I am requested by Mr. Lipscomb, agent to the late Earl of Scarborough, to inform you that I have lost 256] two \*heifers from your wire roping. The cattle has got it into their stomachs with grass, and it has killed them, and I want recompense for them.

"I remain, respectfully yours,

"Martha Firth."

This letter was not answered, and the plaintiff did not take any legal proceedings to try to enforce her rights against the defendants.

10. In the autumn of 1876, the cow the subject of this action was feeding in the same pasture. During the autumn she was observed to be getting very thin and losing strength, and became so ill that she was killed, which was the prudent and proper course. On examining her carcase, a piece of wire about eight inches long was found imbedded in the inner side of the pericardium, and was the cause of the illness resulting in her death.

11. The piece of wire had been picked up by the cow while grazing in the pasture, and was a decayed portion of the wire rope, which had in some way, without fault on the part of the plaintiff, fallen upon the land which she occupied.

12. The plaintiff's loss owing to the death of the cow was shown to be the sum claimed, £27 16s.

The question for the opinion of the court is whether, upon the facts, the defendants are liable for the death of the plaintiff's cow. If the court is of opinion that the defendants are liable, the judgment entered for the plaintiff for £27 16s. will stand : but, if the court is of opinion that the defendants are not liable, judgment is to be entered for the defendants (').

(') A copy of the judgment of the county court judge accompanied the case. The ground upon which he held that the plaintiff was entitled to be compensated by the defendants for the injury she had

sustained was, that they had "used and enjoyed their property in such a manner as to damage her in the use and enjoyment of her property, and that by this misuser of their own property to the

\**Swift* ( *Wills*, Q.C., with him), for the defendants: [257 There was no duty or obligation on the defendants to fence in any particular way, as regards the plaintiff. When the defendants acquired the adjoining land in 1870, the fence was there, and the notice referred to in the case was not given to them, but to their predecessors in title; and it was not a fence of an unusual description. They cannot, therefore, be charged with negligence either in placing or keeping it there. There was no evidence as to how the wire came into the stomach of the cow; and no evidence of negligence on the part of the defendants, nor any legal duty on them for the breach of which they could be liable, any more than in the yew-tree case, *Wilson v. Newbery* (<sup>1</sup>), where Mellor, J., says,—“It is not alleged that the defendant clipped the yew-trees, or that he knew the yew-trees were clipped, or that he had anything to do with the escape of the yew clippings on to his neighbor’s land.”

*Cave*, Q.C. ( *Wilberforce*, with him), for the plaintiff: A person who for his own purposes brings on to his land or keeps there anything likely to do mischief, must care take of it at his peril, and is answerable for the natural consequences of its escape: *Fletcher v. Rylands* (<sup>2</sup>). If his mode of using his land causes damage to his neighbor, he must make compensation: *Lambert v. Bessey* (<sup>3</sup>); *Vaughan v. Menlove* (<sup>4</sup>); *Barnes v. Ward* (<sup>5</sup>); *Bonomi v. Backhouse* (<sup>6</sup>); *Todd v. Flight* (<sup>7</sup>). Where cattle suffer injury through defect of fences which the defendant is bound to maintain, as, by falling down a disused shaft, *Groucott v. Williams* (<sup>8</sup>), or by

plaintiff’s damage they had infringed the rule, *Sic utere tuo ut alienum non lædas*.” And, in stating the facts which induced him to come to this conclusion, the learned judge said,—“For reasons of their own, and with a view to their own interests, the defendants have thought proper to utilize part of the plant which had become useless or unfit for colliery purposes, and apply it for a purpose for which it was not designed nor ordinarily fit. It has from time to time required repair, and the defendants have repaired it, but only to such extent and in such manner as their interests have required. The nature of the material used for the fence rendered it liable to decay from causes which they must have known would operate and be beyond their control, and which would produce results they could not prevent; and these results have wrought damage to the plaintiff in the lawful use and en-

joyment of her own property. This damage having occurred was made known to the defendants, and they continued with such knowledge to use and enjoy their property in the same manner, producing a repetition of the damage to the plaintiff by similar means. It is in the power of the defendants to prevent this damage by adopting a different mode of fencing; but they insist upon their right to continue this mode of fencing, because it would seem to be pecuniarily more beneficial to them.”

(<sup>1</sup>) Law Rep., 7 Q. B., 31; 1 Eng. R., 14.

(<sup>2</sup>) Law Rep., 3 H. L., 330.

(<sup>3</sup>) T. Raym., 421.

(<sup>4</sup>) 3 N. C., 468.

(<sup>5</sup>) 9 C. B., 392.

(<sup>6</sup>) E. B. & E., 622; 34 L. J. (Q.B.), 181; 9 H. L. C., 503.

(<sup>7</sup>) 0 C. B. (N.S.), 377.

(<sup>8</sup>) 32 L. J. (Q.B.), 237.

258] being \*attracted to a hay-rick which is so badly constructed that it falls upon and kills the animal, *Powell v. Salisbury* (\*), the defendant is responsible. In *Wilson v. Newbery* (\*) the question arose upon demurrer. The evidence set out in the case shows that the defendants failed to exercise that degree of care in the use of their land which they were bound to do, and, if notice was necessary, they had it.

*Swift*, in reply, referred to *Greenland v. Chaplin* (\*), where Pollock, C.B., said: "I am desirous that it may be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated."

[DENMAN, J., referred to *Humphries v. Cousins* (\*).]

[The case of *Hurdman v. North Eastern Ry. Co.* (\*) was also cited.]

*Cur. adv. vult.*

March 2. The judgment of the Court (Denman and Lindley, JJ.,) was delivered by

LINDLEY, J.: Since the argument of this case we have considered the recent decision of the Court of Appeal (*Hurdman v. North Eastern Ry. Co.* (\*)), which was cited to us, and are satisfied that we need not defer our judgment.

After stating the facts, his Lordship proceeded: Reliance was placed on the notice given by the plaintiff when she first suffered loss of her cattle from the cause now complained of. There was no evidence to show that the letter containing the notice reached those to whom it was addressed, nor that any answer to it was sent by them. But, even supposing that the letter had been received by the predecessors of the defendant company, we should go too far were we to hold such notice to be good notice in law to the defendants. Nevertheless, even without the notice, this action seems to us, upon the facts of the case, to be maintainable. The \*nature of the wire was known to the defendants; that parts of it should fall on the plaintiff's land was a natural result of the decay of the wire; and the pieces being hidden in the grass were naturally liable to be swallowed by the cattle grazing there. The defendants, therefore, seem to us to be answerable for the injury to the plaintiff's cow which was caused by the natural result of their

(\*) 2 Y. & J., 391.

(\*) 5 Ex., 248, 248; 19 L. J. (Ex.), 298.

(\*) Law Rep., 7 Q. B., 81; 1 Eng. Rep.,

(\*) 2 C. P. D., 239; 20 Eng. R., 500.

14,

(\*) *Ante*, p. 81.

acts. We concur in the judgment of the county court judge; and we also accept the decision in *Humphries v. Cousins* <sup>(1)</sup> as extending the principle upon which this action is in our opinion maintainable.

The only case causing any doubt in our minds was *Wilson v. Newbery* <sup>(2)</sup>. But after consideration we think it is distinguishable, for the reason suggested by Mr. Cave, viz., that the decision was given on demurrer: the facts were obscure, and the declaration did not show in what part of the defendant's land the yew-trees grew, nor how the clip-pings came on to the land of the plaintiff. Therefore we do not think that case ought to guide our decision, when all the other cases in the Queen's Bench which have been cited are clearly in favor of the present plaintiff.

Our conclusion is that this action can be maintained on principle, and that the judgment below should be affirmed.

*Wills*, Q.C., asked for leave to appeal.

GROVE, J., doubted whether the court had power to grant it. No leave therefore was given <sup>(3)</sup>.

*Judgment affirmed.*

Solicitor for plaintiff: *H. T. Wood.*

Solicitor for defendants: *Field & Roscoe.*

<sup>(1)</sup> 2 C. P. D., 239; 20 Eng. R., 500.

<sup>(2)</sup> Law Rep., 7 Q. B., 31; 1 Eng. R., 14.

<sup>(3)</sup> The question as to the power of the divisional court to grant leave to appeal in these cases has recently been under the

consideration of the Court of Appeal. See *Crush v. Turner*, W. N., 1878, p. 139; where the court (Brett, Cotton, and Thesiger, L. JJ.) held that an appeal will lie, notwithstanding s. 20 of the Appellate Jurisdiction Act, 1876.

See 1 Eng. R., 16 note; 6 id., 603 note; 16 id., 446 note; 21 id., 144 note.

[3 Common Pleas Division, 260.]

May 17, 1878.

**\*MORGAN and Others v. DAVIES and Another. [260]**

*Landlord and Tenant—Notice to quit—Customary Half-year.*

A six months' notice to determine a yearly tenancy commencing on one of the ordinary Feast-days, means a "customary six months," that is, from one of the usual quarter-days to the quarter-day next but one following, though such six months should exceed or fall short of the number of days which constitute half a year. Consequently, a notice served on the 26th of March, to quit on the 29th of September then next, is not a valid notice.

**ACTION** in the county court of Cardigan holden at Lampeter, to recover possession of a messuage and lands in the

1878

Morgan v. Davies.

county of Cardigan, held by the defendants as yearly tenants at the annual rent of £30, and also to recover £23 2s. for mesne profits. The cause was tried on the 16th of February, 1878, when it was admitted that the defendants occupied the premises in question as yearly tenants of one David Richards, that the tenancy commenced on the 29th of September, that a notice was served by Richards upon the defendants on the 26th of March last requiring them to quit on the 29th of September then next, and that since the 26th of March last and before the commencement of the action Richards had conveyed all his interest in the premises to the plaintiffs.

The county court judge held that the notice had not been served in time, and gave judgment for the defendants, with costs.

On the 18th of February, the plaintiffs' solicitor applied for a copy of the judge's notes, to enable him to appeal by motion against the decision, pursuant to 38 & 39 Vict. c. 50, s. 6<sup>(1)</sup>, but did not get them.

261] \**M'Call*, on the 20th of February, and on four or five subsequent occasions, the last being on the 10th of May, obtained orders "that the time for hearing the application by way of appeal be extended until further order, to enable the judge who tried the action to furnish a copy of his notes to the parties," and that the proceedings in the action be in the meantime stayed; and on the 17th of May, upon an affidavit of service of the above order upon the registrar of the county court at Lampeter, and of a renewed application

(<sup>1</sup>) 38 and 39 Vict. c. 50, s. 6: "In any cause, suit, or proceeding other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision, by motion to the court to which such appeal lies, instead of by special case, such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the court to which such motion shall be made shall seem fit. And, if the court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior court sitting in chambers. And

at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding, and he shall, at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons; and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal."

See *Turner v. Great Western Ry. Co.*, 2 Q. B. D., 125.



for a copy of the notes, in reply to which the plaintiff's solicitor was informed that "the judge declined to supply him with a copy of the notes taken by him at the trial, on the ground that the notes so taken by him were not such as are contemplated by s. 6 of 38 & 39 Vict. c. 50," the motion was renewed, with a suggestion that the production of the judge's notes might under the circumstances be dispensed with, which it was submitted the court might in its discretion do, notwithstanding the order of the 22d of January, 1877<sup>(1)</sup>.

[GROVE, J.: I doubt whether we have power to interfere with the judge of the county court: he has been guilty of no disobedience of a direct order of this court for which we could attach him.]

It would be competent to the court to make an order under 19 & 20 Vict. c. 108, s. 43<sup>(2)</sup>.

\*[GROVE, J.: I do not think it will be necessary to [262 adopt that course, though, to say the least of it, the conduct of the judge in withholding his notes is extraordinary<sup>(3)</sup>. I do not think the rule of January, 1877, makes the production of the notes an absolute condition to the party's right to appeal: it precludes him from moving without a copy of the notes, "unless otherwise ordered." We will hear your motion.]

The only question at the trial was whether a six months' notice to determine a yearly tenancy which commenced on the 29th of September served on the 26th of March was a sufficient notice. If "half a year," viz., 183 days, will do, the notice would have been in time if served on the 28th. This point was not taken in *Papillon v. Brunton*<sup>(4)</sup>: there the notice was written and posted on the 25th of March, and

(1) "It is ordered that motions under the 6th section of 38 & 39 Vict. c. 50, shall be made in the Queen's Bench, Common Pleas, or Exchequer Divisions of the High Court of Justice only upon the days appointed by those divisions for hearing appeals from inferior courts; and no such motion shall be made by way of appeal from any county court unless a copy of the judge's notes, signed by the judge, shall have been handed to the proper officer in court, unless otherwise ordered."

(2) "No writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior court or a judge thereof, upon an affidavit of the

facts, for a rule or summons calling upon such judge or officer of a county court, and also the party to be affected by such act, to show cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shown, the superior court or judge thereof may by rule or order direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order, shall obey the same on pain of attachment; and in any event the superior court or the judge thereof may make such order with respect to costs as to such court or judge shall seem fit."

(3) This was afterwards satisfactorily explained.

(4) 29 L. J. (Ex.), 265.

1878

Morgan v. Davies.

the only question was whether the jury might presume that it was delivered at the office of the landlord's agent (an attorney) within business hours on the same day; and it was held that, in the absence of evidence to the contrary, the jury might so presume upon proof that it was posted in time. There are, however, authorities which, as far as they go, seem adverse to the plaintiff's contention. In *Keily v. Quin* (<sup>1</sup>), a notice served on the 28th of March to quit on the 29th of September following (the gale days being the 25th of March and 29th of September), was held not to be a sufficient notice to determine a tenancy from year to year commencing on the 29th of September. The court there assume the "reasonable half-year's notice" to be from the Feast of the Annunciation to the Feast of St. Michael. In *Roe d. Durant v. Doe* (<sup>2</sup>), a notice served on the 28th of September, to quit on the ensuing 25th of March, was held to be a sufficient half-year's notice to quit, though less than 182 days; Tindal, C.J., saying,—“A customary half-year is sufficient” (<sup>3</sup>). In *Right d. Flower v. Darby* (<sup>4</sup>) the notice was served, as here, on the 26th of March, to quit on the 29th of September following; and Lord Mansfield, C.J., and Buller, J., held it to be insufficient, the latter saying,—“The case in the Year Books (<sup>5</sup>) requires half a year's notice; but here there is less than half a year's notice.” But, in *Rogers v. Kingston Dock Co.* (<sup>6</sup>), Page Wood, V.C., held, that, where a tenancy from year to year is determinable upon six months' notice to quit, a notice given six lunar months prior to the expiration of the year is sufficient to determine the tenancy.

GROVE, J.: The Vice-Chancellor, in the case last cited, was dealing with the construction of an agreement, not with reference to a Feast-day tenancy. The whole thing depends upon custom. Eyre, B., in *Doe d. Puddicombe v. Harris*, cited *arguendo* in *Right d. Flower v. Darby* (<sup>4</sup>), assumes the customary notice to be from Feast day to Feast day; and the judgment in that case is very explicit to the same effect. Tindal, C.J., in *Roe d. Durant v. Doe* (<sup>2</sup>) intimates the same opinion. I am therefore of opinion that the county court judge was right in holding the notice given in this case to be insufficient.

LINDLEY, J.: I agree with my Brother Grove that the judge was right in holding that the notice to quit was insuf-

(<sup>1</sup>) 2 Jones (Ir. Ex.), 593.

(<sup>2</sup>) 6 Bing., 574.

(<sup>3</sup>) And see Cole on Ejectment, 48; Woodf. Land. and Ten., 11th ed., p. 313.

(<sup>4</sup>) 1 T. R., 159.

(<sup>5</sup>) 13 H. 8, fo. 15 b.

(<sup>6</sup>) 34 L. J. (Ch.), 165.

ficient. The case of *Keily v. Quin* <sup>(1)</sup> seems to me to be conclusive. But the other three cases of *Doe d. Puddicombe v. Harris*, *Right d. Flower v. Darby* <sup>(2)</sup>, and *Roe d. Durant v. Doe* <sup>(3)</sup> are almost equally so.

*Rule refused.*

Solicitors for defendants: *Morgan & Gilks*, for Davies, Aberystwith.

<sup>(1)</sup> 2 Jones (Ir. Ex.), 598.

<sup>(2)</sup> 1 T. R., 159.

<sup>(3)</sup> 6 Bing., 574.

[3 Common Pleas Division, 272.]

March 1, 1878.

**\*FIELDING, Appellant; RHYL IMPROVEMENT [272  
COMMISSIONERS, Respondents.**

*By-Laws, Reasonableness of, and Mode of Publication—Rhyl Improvement Act, 15 Vict. c. xxxii—Public Health Acts, 1848, 1858.*

Under a local act incorporating the provisions of the Public Health Acts, 1848 and 1858, by-laws were made, by which it was amongst other things provided that "every person who shall intend to erect any new building shall give a week's notice to the town surveyor of such intention, by writing delivered to the surveyor or left at his office, and shall at the same time leave at the office detail plans and sections of every floor of such intended new building," &c.; and a penalty not exceeding £5 is imposed for non-compliance with this requirement.

The appellant, without giving such notice or delivering any plans, erected certain structures which from their description could not be intended for residential purposes, and which were found by the justices, upon a case stated under 20 & 21 Vict. c. 43, to have been erected for a temporary purpose only, and to have been intended to be pulled down by the appellant when that purpose was answered:

*Held*, that a conviction under the above mentioned by-laws could not be sustained, inasmuch as such by-laws, if intended to apply to such structures, were unreasonable and bad.

By the local act (passed in 1847) the commissioners were empowered to make by-laws, which were to be published by being printed and a copy delivered to every person applying for the same, and by painting or placing on boards to be hung up on the front of the office of the commissioners, and also on some conspicuous part of the works or locality to which the same related. Under the Public Health Acts, 1848 and 1858, the prescribed mode of publication of by-laws is by "printing and hanging the same up in the office of the local board:"

*Held*, that a publication in the manner prescribed by the last mentioned acts was sufficient.

[8 Common Pleas Division, 282.]

Nov. 27, 1877.

[IN THE COURT OF APPEAL.]

282] \*STONE V. THE CITY AND COUNTY BANK, Limited.  
 COLLINS V. THE CITY AND COUNTY BANK, Limited.

*Company—Action to recover back Money paid for Shares, on the ground of Fraud—Voluntary winding up—Companies Acts, 1862 and 1867—Construction of Agreement—Calls—Notice of Call.*

The principle of *Oakes v. Turquand* (Law Rep., 2 H. L., 325), extends to the voluntary winding up of a company formed under the Companies Acts, 1862 and 1867. Where, therefore, a company, its assets being insufficient to meet its liabilities, is voluntarily wound up, a shareholder in such company, who has been induced to take shares by the fraudulent representation of its directors, cannot repudiate his shares, nor seek to rescind a contract in respect of them, nor can he recover back from the company money paid by him for the shares.

The notice to the shareholders convening the meeting at which an extraordinary resolution was passed to wind up a bank voluntarily and appoint a liquidator (in which was embodied an agreement by the directors with B. & Co., a London banking firm, to transfer to the latter all the assets of the bank upon their undertaking the debts and liabilities of the bank, not including any claims of shareholders to have money repaid to them on the ground of fraud), was in the words of s. 129, clause 3, of the Companies Act, 1862:

*Held*, by Lindley, J., that the notice was sufficient and the resolution binding on all the shareholders of the bank (under s. 136), whether they were present and voted for it or not.

By the agreement referred to in the above resolution it was provided, amongst other things, that B. & Co. should pay all the debts and liabilities of the bank, and should indemnify the bank and the shareholders against the same; that the whole assets of the bank, "including under such term the uncalled capital and any arrears of calls already made," should be transferred by the bank to B. & Co., who should be empowered to collect and get in all the said assets of the bank; and that the bank should admit B. & Co. as creditors against the bank in respect of all payments made by them to or on behalf of the bank:

*Held*, by Bramwell, Brett, and Cotton, L.JJ., in the Court of Appeal, affirming the judgment of Lindley, J., that the effect of this arrangement was to keep alive the debts and liabilities as against the bank, and in favor of B. & Co., to the extent necessary to entitle the latter to recoup themselves, in respect of their payments, out of the assets of the bank, including its uncalled capital.

By the articles of association of the bank every shareholder was required to pay calls to the person and at the time and place appointed by the directors; and twenty-one days' notice was to be given of the time and place appointed. By a resolution of the directors before a voluntary winding up, they made a call payable by instalments at certain dates, but no place or person at which or to whom the call was to be paid was mentioned, and no notice of the call was given by the directors; 283] after the winding up the liquidator gave notice to the shareholders \*that a call had been made, and requested them to pay it to certain persons at a specified place and time:

*Held*, by Bramwell, Brett, and Cotton, L.JJ., in the Court of Appeal, affirming the judgment of Lindley, J., that the liquidator had power to enforce the call made by the directors, and that the notice given by him was sufficient under the Companies Act, 1862, s. 93, clauses 4 and 8, and s. 133, clauses 5 and 7.

## STONE V. THE CITY AND COUNTY BANK.

SPECIAL CASE stated under an order of this division.

Action to recover back £500, which the plaintiff paid for certain shares in the defendants' company. The defendants by way of counter-claim demanded of the plaintiff, as shareholder in the defendants' company, £200 in respect of calls on the shares.

2. The defendants were a company incorporated under the Companies Acts, 1862 and 1867 (25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 131), limited by shares, with a capital of £500,000 divided into 100,000 shares of £5 each, and carried on business in London, and certain persons carrying on business as bankers in Leeds under the style of Williams, Brown & Co., and in London under the style of Brown, Janson & Co., purchased the assets and undertook to pay all the debts proved or to be proved against the defendants' company under the circumstances hereinafter more particularly mentioned. The London firm of Brown, Janson & Co. were the clearing bankers of the defendants' company.

3. The defendants, about Midsummer, 1874, issued a prospectus describing their bank as in active and successful operation, and stating that the business already done had enabled the directors to declare dividends commencing December, 1872, at the rate of 5 per cent. per annum, and gradually increasing to 7 per cent. for the twelve months ending the 30th of June, 1874. The prospectus also described the business as profitable.

4. The defendants also issued a report and balance-sheet for the half-year ending June 30th, 1874. From this report and balance-sheet it appeared that the defendants had in the said half-year made sufficiently large profits to enable them to declare a dividend at the rate of 7 per cent. per annum for the half-year. This balance-sheet misrepresented the amount of the cash in hand at the defendants' bankers in the manner hereinafter fully described, and also treated a considerable amount of bad debts due to \*the de- [284 fendant's company as being good and valuable assets of the defendants' company.

5. The plaintiff received from the defendants a copy of the prospectus in August, 1874, and also the report and balance-sheet before mentioned, and was induced by the statements contained in the prospectus, report, and balance-sheet, to apply to the defendants on or about the 2d of September, 1874, for 200 shares in the capital of the defendants' company, and paid to the defendants in respect thereof

the sum of £500, and the defendants allotted to the plaintiff 200 shares accordingly. But for the misrepresentation as to the amount of the cash in hand at the bankers, the plaintiff would not have applied for the shares.

6. The statements contained in the prospectus as to the bank being in active and successful operation, and as to the business already done enabling the directors to declare dividends at the rates therein stated, and also as to the profitable nature of the business of the company, were false to the knowledge of the directors. The balance-sheet also, as the directors well knew, did not truly represent the financial position of the defendants, the company not being in truth and in fact entitled to place on the credit side of their balance-sheet the amount that therein appeared.

7. The defendants issued and published the prospectus, report, and balance-sheet so received by the plaintiff for the purpose of inducing the plaintiff and others to take shares in the company, and did induce the plaintiff and others to take shares on the faith of the same.

8. On the 16th of July, 1875, the resolution hereinafter set out for the voluntary winding-up of the defendants' company was passed, and in November, 1875, a criminal charge was made and heard at the Mansion House, London, against the directors of the defendants' company for the frauds hereinbefore mentioned; and the plaintiff then first became aware of the said frauds. The investigation of the charge was continued into the month of December, 1875, and on the 14th of January, 1876, and (as a matter of fact apart from all questions of law arising upon the other facts herein stated) within a reasonable time after the false and fraudulent nature of the prospectus, report, and balance-sheet \*had come to his knowledge, the plaintiff repudiated the shares allotted to him.

9. The plaintiff claims in this action to be repaid by the defendants the sum of £500 so paid by him; together with interest at £5 per cent. per annum from the date of the allotment.

10. The defendants at the time they commenced the business of bankers in London had no sufficient subscribed capital of their own wherewith to carry on such business, but assistance was afforded by Brown, Janson & Co., to whom the defendants were always indebted in a large amount.

11. At the close of each day after the 28th of October, 1873, the current account of the defendants with Brown, Janson & Co., was overdrawn (except on the special occasions referred to in paragraphs 14 and 15), so that the de-

fendants were entirely dependent upon Brown, Janson & Co., who thenceforth had it in their power at any time to put an immediate stop to the business of the defendants by refusing to honor their checks. Such power was in fact exercised by Brown, Janson & Co. on the 15th of May, 1875.

12. It is the almost universal custom with bankers to balance their books as of the 30th of June and 31st of December in every year; and the defendants balanced their books at those dates; and it was also the custom of the defendants to print and publish a balance-sheet, which purported to show their financial position at the close of such half-yearly periods, in order to induce the public to apply to them for allotments of their unsubscribed capital.

13. Many of such applications were made through Brown, Janson & Co., who received the moneys payable in respect of such applications and also the moneys payable on and after allotment; and they credited the defendants with such moneys when received. Such applications were in fact numerous and continued down to the time of the suspension of the defendants hereinafter mentioned.

14. On the afternoon of the 30th of June, 1874, one of the London partners of Brown, Janson & Co., at the request of one of the officers of the defendants' company, entered to the credit of the defendants' current account the sum of £15,000 by way of a loan, and the defendants' pass-book was balanced as of the close of that day, by making it appear that the defendants had to the credit of their banking account the sum of £12,175 18s. 1d. This sum of £15,000 \*was entered in the books of Brown, Janson & Co. [286 as a loan by them to the defendants; but the understanding between the defendants and the London partner in the firm of Brown, Janson & Co. was, that such loan was to be written off on the following morning, and was not to be drawn upon by the defendants. On the morning of the 1st of July, 1874, the sum of £15,000 was accordingly entered to the debit of the current account, with one day's interest, and appeared in the pass-book as the first debit entry of that day, and was credited to the loan account, whereupon the account current of the defendants' company with Brown, Janson & Co. showed an overdraft of £2,824 1s. 11d. according to the true state of the account, instead of the apparent credit balance of £12,175 18s. 1d.

15. An operation precisely similar in every respect had been gone through at the close of the previous half-year with the sum of £5,000, and at the close of the half-year previous to that with the sum of £1,500 and on no other occasion.

16. The defendants' purpose, with regard to such entries was, to conceal from their shareholders and the public the fact of their current account with their bankers being overdrawn, and the absence of cash reserves available for carrying on business; and they so used the same in the balance-sheet hereinbefore referred to.

18. On or about the 11th of February, 1875, the defendants paid to the plaintiff one half-year's dividend on his shares at the rate of 7 per cent. per annum.

19. On the 18th of May, 1875, the defendants stopped payment, and Brown, Janson & Co. presented a petition to the Court of Chancery that the defendants' company might be wound up compulsorily under the direction of the court. On the same day several other petitions for the compulsory winding up of the defendants' company were presented by shareholders and creditors respectively, including one by a shareholder of the company named Hird. On the 22d of May, 1875, Mr. Hart was, on the petition of Hird, appointed provisional liquidator of the company. Brown, Janson & Co. took out a summons to discharge the order appointing Hart provisional liquidator, which summons was dismissed on the 25th of May, 1875. On the 27th of May, 1875, a document [287] of that date was drawn up and executed by Brown, Janson & Co. and the directors of the defendants' company, whereby it was provided that the whole assets of the bank, including the uncalled capital, should be forthwith transferred to Brown, Janson & Co., and that Brown, Janson & Co. should pay all the debts and liabilities of the bank as stated in the schedule to the document, and should indemnify the bank and every shareholder thereof against the same.

20. On the 28th of May, 1875, an order was made upon the petition of Hird for the compulsory winding up of the company.

21. Brown, Janson & Co. appealed against the order of the 28th of May, 1875; and on the 28th of June, upon the hearing of the appeal, the Lords Justices of Appeal discharged the order, with liberty to the defendants' company to call a meeting of the shareholders of the defendants' company for the purpose of considering the agreement of the 27th of May proposed as aforesaid by Brown, Janson & Co.: and on the 16th of July, 1875, at an extraordinary general meeting of the shareholders of the defendants' company, of which due notice specifying the intention to propose thereat such resolutions had been given, the following extraordinary resolutions were passed:



1. That it has been proved to the satisfaction of the shareholders that the bank cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same.

2. That the bank be wound up voluntarily under the provisions of the Companies Acts, 1862 and 1867.

3. That Mr. S. L. Price be appointed liquidator for the purpose of winding up the affairs of the bank.

4. That the agreement dated the 27th of May, 1875, and made between the City and County Bank, Limited, and W. Jones and others, directors of the bank, of the one part, and S. J. Brown and others, trading under the style or firm of Brown, Janson & Co. of the other part, being an agreement for the payment by them of the debts and liabilities of the bank, and for the transfer to Messrs. Brown, Janson & Co. of the assets of the bank, be and the same is hereby confirmed, and declared to be binding on the bank.

5. That Mr. S. L. Price, as such liquidator as aforesaid, be requested, authorized, and empowered to carry out and complete the same forthwith.

The plaintiff by his proxy voted at the meeting in favor of the resolutions.

22. On the 23d of July, 1875, the matter came again before the Lords Justices of Appeal, and a discussion took place with \*respect to the document of the 27th of May, 1875; and [288 it was suggested that there might be other debts and liabilities of the defendants' company, of the same kind and description as those enumerated in the schedule, which were not included in the schedule; and thereupon Brown, Janson & Co. by their counsel, submitting to the jurisdiction of the court, undertook to pay all the debts proved or which should be proved against the City and County Bank, Limited, whether scheduled to the agreement of the 27th of May or not. In giving this undertaking, the counsel for all parties were treating and agreeing with reference only to debts and liabilities of the kind appearing in the schedule to the document, and not with reference to any claims by the shareholders themselves to have money repaid to them on the ground of fraud.

24. Brown, Janson & Co., on the 23d of July, 1875, had, and ever since had, ample means of their own to pay all creditors of the defendants' company, and had in fact paid all the creditors claiming in respect of debts of the kind and description scheduled to the document. They had not paid any of the claims by the shareholders themselves claiming from the defendants' company a return of moneys paid by them to the defendants in respect of shares, which they were induced to take by the fraud of the defendants. At the time of the stoppage of the defendants' company the debt due from them to Brown, Janson & Co. amounted to £45,000 or thereabouts; and the assets of the defendants' company were insufficient to satisfy the debts of the defendants (apart from the debt due to Brown, Janson & Co., and apart from claims by shareholders for the return

1877

Collins v. City and County Bank.

of moneys paid in respect of shares); and Brown, Janson & Co. will ultimately be out of pocket to a considerable amount by reason of the undertaking given by them as in the 22d paragraph of this case mentioned.

25. By the memorandum and articles of association of the defendants' company it was provided that every shareholder should be liable to pay the amount of every call to the person and at the time and place appointed by the board, and twenty-one days' notice should be given of the time and place appointed by the board for the payment of every call. On the 18th of May, 1875, it was resolved by the board of directors of the company that a call of £1 per share be and was thereby made, such call to become due 289] and \*be payable as follows,—10s. on the 21st of June, and 10s. on the 21st of July then next, and that such call be hypothecated to Brown, Janson & Co. No place or person, at which or to whom the said call was to be paid, was mentioned in the resolution. No notice of the call was ever given by the directors of the defendants' company: but, on the 26th of August, 1875, S. L. Price, the liquidator of the defendants' company, who had been so appointed as aforesaid, gave notice to the shareholders of the said call, and requested them to pay the same to Brown, Janson & Co., 32 Abchurch Lane, London, on or before Saturday, the 18th of September then next. The last mentioned notice was received by the plaintiff on the 27th or 28th of September, 1875, upon his return from abroad; but he did not pay the call or any part thereof.

26. On the 12th of September, 1875, the plaintiff was settled on the list of contributories of the defendants' company at a meeting convened for that purpose, of which he had received notice.

27. Before the plaintiff repudiated his shares, as in paragraph 8 mentioned, Brown, Janson & Co. had acted upon the agreement and undertaking in paragraph 22 mentioned, and had paid certain of the debts of the company.

The questions for the opinion of the court were,—1. Was the plaintiff under the circumstances hereinbefore set forth entitled to recover against the defendants the said £500 and interest?—2. Were the defendants entitled to recover against the plaintiff the said £200 and interest?

#### COLLINS V. THE CITY AND COUNTY BANK.

Declaration for money received by the defendants for the use of the plaintiff, and for interest. Claim, £50. By the

particulars the plaintiff claimed two several sums of £20 and £10.

Pleas,—1. Never indebted, except as to £30,—2. As to £30, for defence on equitable grounds, that the defendants are a company limited by shares registered and incorporated under the Companies Acts, 1862 and 1867, with a capital of £500,000 divided into 100,000 shares of £5 each, and that the directors of the company issued and published a prospectus, report, and balance-sheet containing certain false and fraudulent misrepresentations and statements as to the company and its financial position, with \*intent [290 to induce, and by the said misrepresentations and statements induced (amongst others) the plaintiff to become a member of the company and the holder of twenty shares of the company, and to pay to the company £30 upon and in respect thereof: that afterwards, while the plaintiff and others were members of the company and the holders of shares of the company, and before the plaintiff disaffirmed his rights or liabilities as a member of the company and the holder of the shares, or repudiated the shares or any of them, the company duly passed an extraordinary resolution within the meaning of the Companies Act, 1862, to the effect that it had been proved to their satisfaction that the company could not by reason of its liabilities continue its business, and that it was advisable to wind up the same, and that the company be wound up voluntarily under the provisions of the Companies Acts, 1862 and 1867, and a liquidator was duly appointed to wind up the affairs of the company: that the assets of the company were and are insufficient for payment of the debts and liabilities of the company and the costs of the winding-up, by an amount exceeding the sum of all the amounts remaining unpaid upon all the shares of the company held by the members thereof; and that, before the plaintiff disaffirmed his rights and liabilities or repudiated his shares or any of them, creditors of the company and other persons having claims against the company acquired rights and interests disentitling the plaintiff to disaffirm his rights and liabilities or to repudiate the shares; and that the plaintiff is a contributory of the company and liable to contribute to the assets of the company, required for payment of the debts and liabilities of the company and the costs of the winding up, to the extent of the amount unpaid up on his shares: and that the plaintiff's claim herein pleaded to is a claim to recover back the £30 so paid by him to the company as aforesaid, on the ground that he was induced to become a member of the company and the holder

of the shares, and to pay the £30, by the fraudulent misrepresentations and statements contained in the prospectus, report, and balance-sheet, and not otherwise.

Second replication on equitable grounds,—that the said extraordinary resolution included a resolution in the words and figures following: [The replication set out the 4th resolution mentioned \*in paragraph 21 and averred] that by the agreement of May 27, Brown, Janson & Co. agreed to take over all the assets of the defendants' company; and in consideration thereof to pay all the liabilities of the defendants' company included in a schedule to the agreement annexed; and afterwards, on the hearing of an appeal before the Lords Justices of Appeal against certain orders made in the Court of Chancery in the matter of a petition for the compulsory winding-up of the defendants' company, Brown, Janson & Co., who were represented by counsel on the hearing of the appeal, undertook to pay, not only all the liabilities of the defendants' company included in the schedule to the agreement, but also all the liabilities of the defendants' company whether included in the schedule or not; that the undertaking of Brown, Janson & Co. was made through their counsel on the hearing of the appeal, and was embodied in the order made by the Lords Justices of Appeal disposing of the appeal; and the whole of the beneficial interest in the assets of the defendants' company vested in Brown, Janson & Co. in pursuance of the agreement and undertaking; and that Brown, Janson & Co. have sufficient assets to pay the whole of the liabilities of the defendants' company in full, with all interest; and that this action is being defended for the sole benefit of Brown, Janson & Co., who have undertaken to pay all the liabilities of the defendants' company, and in whom all the assets of the company have vested: and that Brown, Janson & Co. were privy to the false and fraudulent representations and statements made by the directors at the time of the meeting thereof and before the agreement of May 27, 1875, as amended by the said undertaking, became binding on Brown, Janson & Co., and before the plaintiff was induced to become a holder of the said shares in the company and to pay the £30, of which sum Brown, Janson & Co. have the benefit, not only as assignees of the assets of the company, but as creditors of the company.

The second rejoinder to the second replication set out the agreement of the 27th of May, 1875, of which the material parts are:

3. If Price, Waterhouse & Co. shall, on or before the 29th day May, 1875, report to Brown, Janson & Co., that the statement of liabilities in the schedule \*is correct, then Brown, Janson & Co. shall pay all the debts and liabilities of the bank as stated in the schedule, and shall indemnify the bank and every shareholder thereof against the same. (292

4. The whole assets of the bank, including under such term the uncalled capital and any arrears of calls already made, but exclusive of any good-will or alleged good-will of the bank, which is retained by the bank, shall be forthwith transferred by the bank to Brown, Janson & Co., who shall be empowered in such manner as Brown, Janson & Co. shall direct, to collect and get in all the assets, and the bank and the directors thereof shall execute all such instruments and do all such things as Brown, Janson & Co. shall require, for the purpose of giving effect to the aforesaid transfer. The bank and the directors thereof shall on request deliver to Brown, Janson & Co., or such person as they shall in writing appoint, all the books, papers, and securities of the bank.

5. The bank shall admit Brown, Janson & Co. as creditors against the bank in respect of all payments made by Brown, Janson & Co., to or on behalf of the bank.

6. If after payment to Brown, Janson & Co. of all moneys paid by them for or in respect of the debts and liabilities of the bank, with interest at £4 per cent. on such moneys, from the date of the payment thereof, and the payment of all costs of and attending and preliminary to these presents and of realizing the assets, and ascertaining the debts and liabilities, and the petitions for winding up the bank and consequent thereon and in connection therewith, there shall remain any surplus of the assets of the bank, Brown, Janson & Co. shall pay such surplus to the liquidator.

The rejoinder then set out the order of Lords Justices embodying the undertaking of Brown, Janson & Co., mentioned in paragraph 22 in the second replication, and concluded as follows: that the plaintiff's claim in respect of the matters in the second plea pleaded to is not a debt or liability included in the schedule to the agreement, and is not a debt within the meaning of the said undertaking; and that Brown, Janson & Co. have not sufficient assets of the defendants' company to pay the whole of the liabilities of the defendant company in full, and all interest; and that this action is not being defended for the sole benefit of Brown, Janson & Co.; and that Brown, Janson & Co. were not privy to the false and fraudulent representations and statements, as alleged.

Issue thereon.

The case of *Collins v. The City and County Bank*, which was tried before Lindley, J., without a jury, was argued before the learned judge upon further consideration, together with the special case of *Stone v. The City and County Bank*, by consent.

C. Russell, Q.C., and R. V. Williams, for the plaintiffs.

\* *Wood Hill* (Thesiger, Q.C., and Cohen, Q.C., [293 with him). for the defendants.

1877

Stone v. City and County Bank. Collins v. The Same.

The facts and arguments sufficiently appear from the judgment.

*Cur. adv. vult.*

June 27. Judgment was delivered by

LINDLEY, J.: In these two cases of *Stone v. The City and County Bank* and *Collins v. The City and County Bank* I do not think it necessary to refer at any length to the facts, which are really not in dispute.

The plaintiffs in these actions seek to recover from the defendants' company the moneys they paid to the company in respect of shares in the company allotted to them; and the ground of action is in both cases the same, viz., that the plaintiffs were induced by the fraud of the company to apply for and take the shares allotted to them. The fact, that the plaintiffs were induced by fraud on the part of the company to take the shares, is admitted by the pleadings in Collins's action, and is found in the special case in Stone's action; and I therefore assume this point in favor of both plaintiffs. It is further found in one action, and admitted in the other, that the plaintiffs repudiated their shares before action and in a reasonable time after they discovered the fraud. Under these circumstances, if the company were not being wound up as hereinafter mentioned, the plaintiffs would be entitled to succeed. But, before these actions were brought, and before the plaintiffs repudiated their shares, and before in fact they discovered the fraud entitling them to repudiate their shares, a resolution was passed for winding the company up voluntarily, under the provisions of the Companies Act, 1862; and it is admitted in the one action and found in the other that at the time of the commencement of the winding up the assets of the company, including its uncalled capital, were not sufficient to pay its undisputed debts and liabilities.

Now, assuming that the resolution to wind up was valid, and that the company was really being wound up under it, I am of opinion that this winding up and state of the assets are fatal to the plaintiffs, and afford a complete defence to 294] both actions. My \*reasons for this opinion are that the plaintiffs are not suing the company for unliquidated damages for the frauds of which they complain. I have looked at the pleadings, and I am satisfied that they do not admit of any such claim: and it is far too late now to treat the pleadings as amended, so as to raise an action of that kind.

The plaintiffs are seeking to recover what they paid for

their shares. Their claims are based on the theory that they are no longer shareholders,—on the theory, namely, that, notwithstanding the winding up and the state of the assets to which I have alluded, they had a right to rescind, and had rescinded their contracts before the commencement of their actions. But if the plaintiffs had no right to rescind their contracts, their actions were not sustainable.

Now, it appears to me that *Oakes v. Turquand* <sup>(1)</sup> shows conclusively that the plaintiffs had no such right. It was contended by the plaintiffs that for several reasons this decision did not apply to the present cases. First, it was said that it does not appear that any of the debts of the company were contracted on the faith of the plaintiffs being members of it, and that the decision in *Oakes v. Turquand* <sup>(1)</sup> was based on what Lord Campbell said on the subject of estoppel in *Henderson v. Royal British Bank* <sup>(2)</sup>. But, in the first place, it did not appear in that case that Henderson trusted the Royal British Bank by reason of Goddard being a shareholder in it; nor was there any evidence in *Oakes v. Turquand* <sup>(1)</sup> that any creditors in particular had trusted Overend, Gurney & Co., Limited, by reason of Oakes being a shareholder therein. The observations in both these cases on the subject of estoppel are of a general nature, and, as I understand them, are applicable to all registered companies whose registers of shareholders are open to inspection, without reference to the question whether any particular member has more or less induced credit to be given by any particular creditor. But it further appears to me that *Oakes v. Turquand* <sup>(1)</sup> decides at least the general proposition that a person induced by fraud to take shares in a company, formed and registered under the Companies Act, 1862, cannot repudiate those shares after the company has been \*ordered to be wound up by the court, or subject to [295 its supervision, if at the time of repudiation there are any debts of the company unpaid.

Then, it is contended that *Oakes v. Turquand* <sup>(1)</sup> does not apply, as the winding up of the defendants' company is purely voluntary: and in support of this proposition the differences between a voluntary winding up and the other modes of winding up were minutely examined; the omission of the word "creditors" from s. 138, and the remedy given to creditors by s. 145, were dwelt upon; and the observations of the present Master of the Rolls in *Re Poole Fire Brick Co.* <sup>(3)</sup>, and the decision of Bacon, V.C., in *Hall v.*

<sup>(1)</sup> Law Rep., 2 H. L., 325.

<sup>(2)</sup> 7 E. & B., 356; 26 L. J. (Q.B.), 112.

<sup>(3)</sup> Law Rep., 17 Eq., 268.

*Old Talargoch Lead Mining Co.* (<sup>1</sup>), were relied on. But it appears to me impossible to hold that the right of members to rescind their contracts with the company can depend on whether the company is being wound up in one way rather than in another. The object of all modes of winding up is, to insure an equal division of the company's assets, first, amongst all its creditors, and then amongst all its members according to their rights *inter se*; and ss. 131, 132, 133, 138, and 158, which I do not stop to read, show conclusively to my mind that, although the remedies open to creditors are somewhat different in the case of a voluntary winding-up from what they are in other cases, yet their rights, as distinguished from their remedies, are in no respect different, unless it be as regards the time when interest on their debts ceases to run. No case, I believe, exists which is inconsistent with this view. In *Hall v. Old Talargoch Lead Mining Co.* (<sup>1</sup>) the plaintiff had repudiated his shares before the commencement of the winding up, which accounts for Vice-Chancellor Bacon's remark that "no relief is asked against the company beyond what the law allows, or which is inconsistent with the Winding-up Acts,"—an observation which the facts of the cases before me render inapplicable to them. In a voluntary winding-up, protection is afforded to creditors by allowing them to bring actions without the leave of the Chancery Division, and to apply for a compulsory order to wind up, or for a supervision order: but the obligations of the company and of its members, whether statutory or 296] otherwise, \*do not depend upon or vary with the manner in which the winding-up is conducted. In all cases all the assets are distributable *pari passu* amongst all the creditors, and the assets include uncalled capital.

Next, it is contended that the defendants' company was not in fact being wound up voluntarily under the Companies Act, 1862; and if this could be established, I should agree that *Oakes v. Turquand* (<sup>2</sup>) did not apply. It becomes necessary, therefore, to investigate this contention.

First, it was suggested that Collins could not be bound by the resolution to wind up, as he had not received any notice convening the meeting at which the resolution was passed. But this point was disposed of by proof, that notice was sent to him by post to his address as entered in the register of members. Secondly, it was suggested that the notice convening the meeting was invalid, because it was so framed as to lead those to whom it was addressed to conclude that whatever might be resolved upon at that meeting

(<sup>1</sup>) 3 Ch. D., 749; 18 Eng. R., 794.

(<sup>2</sup>) Law Rep., 2 H. L., 325.



would be subject to confirmation at a subsequent meeting; and in support of this objection reliance was placed on the case of *In re Bridport Old Brewery Co.* (<sup>1</sup>). But in this case the notice was in the very words of s. 129, clause 3, of the Companies Act, 1862; and no person, aware of the difference between a special resolution and an extraordinary resolution as defined by the act, could be misled by the notice; and persons not aware of the difference cannot derive any advantage from their ignorance in this respect. Thirdly, it was contended that, even if the resolution to wind up was valid, the company was not being wound up under it, but under a special agreement inconsistent with a liquidation under the act. This agreement, however, was one which was in fact sanctioned by an extraordinary meeting of shareholders duly convened for the purpose of sanctioning it (I looked particularly at the notice to see that, and found it was so), and was and is in my opinion binding on all who were members of the company when so sanctioned, whether they voted for it, as Stone did, or whether they did not, as was the case with Collins: see s. 136. Whether the arrangement was binding on the creditors of the company, depends upon the proportion of creditors who acceded \*to it: [297 but, as no person, who was a creditor when the arrangement was made, has ever questioned it, this point need not be further considered. It is impossible to treat the plaintiffs as creditors of the company, when the arrangement was made, for the sums they seek to recover in these actions; for they had not then repudiated their shares, even if they had a right to do so, which I think they had not after the resolution to wind up had passed.

But then it is said that all the creditors of the company except Brown, Janson & Co., have been paid, and that Brown, Janson & Co. are disentitled, by the part they took in assisting the company in its fraud, from standing as creditors as against the plaintiffs. To this, however, the short answer is, that the debts of the company other than that due to Brown, Janson & Co., were not paid before the commencement of these actions; and that, even if they had been, the true effect of the arrangement under which those debts were paid was, to keep alive those debts as against the company and in favor of Brown, Janson and Co. to the extent necessary to entitle them to recoup themselves in respect of their payments, out of the assets of the company,

(<sup>1</sup>) Law Rep., 2 Ch., 191.

1877

Stone v. City and County Bank. Collins v. The Same.

including its uncalled capital. That this is the true effect of the agreement I think is plain, notwithstanding the last words of clause 3, by which the company and its shareholders are indemnified against such debts.

With reference to that, I will just turn to the agreement itself, which is set out in Collins's case. The material parts of this agreement are the third, fourth, fifth, and sixth clauses. Now, the third clause says that Brown, Janson & Co. shall pay all the debts and liabilities of the bank as stated in the schedule, and shall indemnify the bank and the shareholders against the same. If the agreement had stopped there, one would have supposed that no call could be made upon the shareholders even for the payment of these debts or to recoup Brown, Janson & Co. for what they might pay in respect of them. But that construction is obviously inconsistent with the next clause of the agreement, which goes on to say, "The whole assets of the bank, including under such term the uncalled capital and any arrears of calls already made, but exclusive of any goodwill," and so on, "shall be forthwith transferred by the bank 298] to Messrs. Brown, Janson & Co., who shall \*be empowered, in such manner as Messrs. Brown, Janson & Co. shall direct, to collect and get in all the said assets of the bank." Then there is the next clause, the fifth, which also shows that that indemnity at the end of clause 3 cannot be carried to this extent, that Brown, Janson & Co. were to pay these debts and forego their right to call up the uncalled capital of the company; because clause 5 is, "The bank shall admit Brown, Janson & Co. as creditors against the bank in respect of all payments made by Brown, Janson & Co., to or on behalf of the bank." I think it is quite plain, therefore, reading those clauses together and taking them as a whole, that, whatever doubt may be thrown upon the question by the concluding words of clause 3, the real meaning and effect of this agreement is this, that Brown, Janson & Co. are to pay the debts, but they are to have, in order to recoup themselves, or to enable them to pay themselves, the assets of the bank, including all uncalled capital, and they are to retain the right of insisting upon payment of the calls through the liquidator, notwithstanding the words of indemnity at the end of clause 3. I have no doubt myself that is the true construction.

For the reasons I have given, therefore, I am of opinion that the agreement with Brown, Janson & Co. does not confer upon the plaintiffs a better right to maintain these actions than they would have had if no such agreement had been

made. The agreement, however, does I think place an additional difficulty in the plaintiffs' way; for they cannot derive any benefit from the fact that the debts of the company have been paid by Brown, Janson & Co., and repudiate their right to have the unpaid capital of the company called up to recoup them in respect of their payments to the other creditors of the company. The circumstance, that at the commencement of the winding up the assets of the company were insufficient to pay its debts, even excluding the £45,000 due to Brown, Janson & Co., renders it unnecessary to consider whether their rights as creditors would prevent the plaintiffs from recovering in these actions, regard being had to the alleged complicity of Brown, Janson & Co. in the frauds on which the plaintiffs rely. The same circumstance also renders it unnecessary to determine the important question raised by Mr. Wood Hill upon the wording of the 131st section, viz., whether it is possible \*for any [299 shareholder under any circumstances to repudiate his shares after a resolution to wind up has been passed. A repudiation of shares necessarily involves an alteration in the status of the repudiating shareholder; and the rights of the contributories amongst themselves can be adjusted without any such alteration; nor do I at present see how the language of that section is to be got over; but it may be that the words relied upon are only important for the protection of creditors. However, for the reason I have given, it is unnecessary to pursue this inquiry further on the present occasion. Nor, in the view which I take of this case, is it necessary for me to put any construction on the undertaking given by Brown, Janson & Co., and embodied in the order of the Lords Justices. Whatever may be the meaning of the word "debts" in that undertaking, it gives the plaintiffs no right of action against the company which they would not have had without it; and, if the plaintiffs rely on the undertaking, they cannot repudiate their liability to pay up their shares in full.

It was strongly urged that, if these actions could not be sustained, the plaintiffs would be wholly without a remedy for the fraud from which they have suffered. But the answer to this is that they can bring actions for damages against those who defrauded them, and against the company itself, if the frauds of which they complain were in point of law imputable to the company, which on the materials before me I take to have been the case.

It only remains to consider the counter-claim of the company in Stone's action. A call was made in May, 1875,

1877

Stone v. City and County Bank. Collins v. The Same.

before the commencement of the winding up, by the directors, payable in June and July; but no notice was given by them of this call. After the winding up, viz., on the 26th of August, 1875, the liquidator gave notice to the shareholders of the call, and required payment of it. I am of opinion that he had power to do this under s. 133, clauses 5 and 7, and s. 95, clauses 4 and 8. No reason was given, and no authority was cited, to show the contrary: and the only doubt I had in my own mind was, whether, considering the time which had elapsed from the making of the call, the directors themselves could in August have enforced payment of it on their giving notice of it. I however think they 300] could. The point is only material as regards costs and interest; as, even if this call is not payable, a fresh call can be made in the winding-up. The argument that the claim for calls was really the claim of Brown, Janson & Co., and that they cannot sustain such claim, is met by the agreement with them. The plaintiffs cannot avail themselves of this agreement, even for the purpose of maintaining this argument, without paying up their shares to the extent I have before referred to.

Upon all points, therefore, I am in favor of the defendants' company on both actions, and I pronounce judgment for the company accordingly, with costs.

[The learned judge refused leave to the plaintiffs to amend the proceedings by inserting claims to recover damages for fraudulent representations.]

*In Collins's Case, Judgment for the defendants.*

*In Stone's Case, Judgment for the defendants upon the claim and counter-claim.*

The plaintiff in each action appealed.

Nov. 24, 26, 27. *Charles Russell*, Q.C., for the plaintiff in each action: The question to be determined is, whether a person, who has been induced by fraud to become a member of a company, is entitled to maintain an action for damages after a resolution has been passed to wind it up voluntarily, and when its liabilities exceed its assets.

[*Cohen*, Q.C., for the defendants, intimated that in his view the only question to be decided was, whether the plaintiffs could recover back the money which they had paid for their shares, and could resist the payment of further calls.]

It is submitted that any amendment ought to be made which would enable the plaintiffs to maintain their action; for they have been damaged by the defendants' fraud, and the real question is whether their remedies are barred by

the voluntary winding up. Moreover the plaintiffs are entitled to sue in order to establish that their claims are within the terms of the agreement of the 27th of May, 1875, by Brown, Janson & Co., the scope of which was enlarged by the proceedings before the Lords Justices \*upon the [301 23d of July, 1875. The court ought to assist a *bona fide* claim for relief, Supreme Court of Judicature Act, 1873, s. 24, subs. 7; Rules of the Supreme Court, Order xxvii, Rule 1; and in this case the plaintiffs ought to have the judgment of the court upon the matter really in dispute.

As to the question arising upon the merits, if the company were solvent the plaintiffs would undoubtedly be entitled to maintain actions against the company for the fraud of the directors: Lindley on Partnership, book 2, ch. 1, s. 4, p. 333, 3d ed. Clear authority for this contention is to be found also in *Barwick v. English Joint Stock Bank* (1) and in *Swift v. Winterbotham* (2); the decision in the latter case as to the liability of the principal was overruled in the Exchequer Chamber, *Swift v. Jewsbury* (3); but the judgment of that court proceeded upon a ground immaterial to the purposes of the present argument. These authorities were commented upon in *Mackay v. Commercial Bank of New Brunswick* (4); and the decision in the *Western Bank of Scotland v. Addie* (5), which may at first sight seem to contain dicta against the contention for the plaintiffs, is there distinguished. A principal is liable wherever he has received a benefit by his agent's fraud; and the defendants in these actions by the misrepresentation of their directors have obtained from the plaintiffs the money sought to be recovered.

It is submitted that the right to sue the company, for the fraud of the directors, is not destroyed by their insolvency and by the voluntary winding up; possibly the plaintiffs may be liable to contribute to the assets and to pay further calls, and if they obtain judgments in these actions they may not be able to enforce them until all the creditors shall have been satisfied; but they have vested rights of action which can be taken away only by the provisions of some statute, and no statute deprives a defrauded shareholder of the means of obtaining redress from the company. A great distinction exists between a winding-up by the court and a voluntary winding up: a winding up by the court is a pro-

(1) Law Rep., 2 Ex., 259.

(4) Law Rep., 5 P. C., 394, at pp. 411,

(2) Law Rep., 8 Q. B., 244.

412, 413.

(3) Law Rep., 9 Q. B., 301; 8 Eng. R.,

(5) Law Rep., 1 H. L., Sc., 145.

1877

Stone v. City and County Bank. Collins v. The Same.

ceeding intended to realize the property of the company for 302] the \*benefit of the creditors; and hence no suit can be carried on which is likely to diminish the amount of assets, the Companies Act, 1862, ss. 85, 87, as to a compulsory winding up; ss. 148, 151, as to windings up under the supervision of the court. But that statute does not contain any express provisions similar to these sections in respect of a voluntary winding up, and the claims of the plaintiffs are provable against the company under s. 158. A company that is being wound up voluntarily still exists in its corporate state, s. 131; and therefore it is capable of affording compensation to those shareholders who have been defrauded by its directors. The defendants may rely upon *Grissell's Case* (¹); *Oakes v. Turquand* (²); *Black & Co.'s Case* (³); but in none of those cases was the winding-up merely voluntary. Moreover, in them the contest was, whether a defrauded shareholder was liable to be kept upon the list of contributories for the benefit of the creditors; but the claim of the plaintiffs, in these actions to repudiate their status as shareholders, is a question arising between themselves and the company. No real authority exists for saying that after a voluntary winding up has commenced a member cannot disaffirm the contract to take shares, but, at all events, the plaintiffs are entitled to maintain actions for unliquidated damages upon the ground of fraud.

Then, as to the counter-claim in the action brought by Stone, the memorandum and articles of association required that when a call should be made by the directors they should appoint a time and a place for payment; as the resolution of the 18th of May, 1875, did not provide for these particulars, it was invalid and the omission could not be remedied after the winding up had commenced; the liquidator could not then supplement the resolution by giving notice of a time and place.

*Whitehorne*, for the plaintiff Stone: Under the practice established by the Supreme Court of Judicature Acts, 1873 and 1875, amendments may be made at any stage, however late, of the cause, *King v. Corke* (⁴); *Roe v. Davies* (⁵); and 303] as the fraud of \*the directors is clearly established every assistance ought to be afforded to the plaintiffs in obtaining redress.

As to the question upon the merits, it is to be observed that in *Oakes v. Turquand* (²) the winding up was subject

(¹) Law Rep., 1 Ch., 528.

(³) Law Rep., 8 Ch., 254; 4 Eng. R., 880.

(²) Law Rep., 2 H. L., 325.

(⁴) 1 Ch. D., 57.

(⁵) 2 Ch. D., 729.

to the supervision of the court, whereas in the present action the winding-up was voluntary. It is contended that there was no valid winding-up; by the agreement of the 27th of May, 1875, the whole assets of the bank were to be transferred to Brown, Janson & Co., who were to pay the debts and liabilities mentioned in the schedule thereto; therefore the agreement favored a particular class of creditors. The resolutions for winding up the defendants' company passed upon the 16th of July were based upon and incorporated this agreement and were void, because they contravened the Companies Act, 1862, s. 131, subs. 1, which directs that upon a voluntary winding up the assets shall be applied; *pari passu*, in satisfaction of the liabilities. But even if the resolution to wind up is good, *Hall v. Old Talargoch Lead Mining Co.* (\*) is a strong authority to show the present actions are maintainable; the relief claimed by the plaintiff was of a similar nature, and Bacon, V.C., declined to stay the action upon the ground of the winding-up. It is also submitted that the real foundation for *Oakes v. Turquand* (\*) is that a compulsory winding-up, or a winding-up under the supervision of the court, is in the nature of a bankruptcy; now a voluntary winding-up is only in the nature of an administration suit: *In re Keynsham Co.* (\*); *In re Life Association of England* (\*); *In re Peninsular, &c., Banking Co.* (\*); *In re Poole Firebrick and Blue Clay Co.* (\*).

[COTTON, L.J.: It has been held that upon a compulsory winding-up a creditor holding security is entitled to prove for the whole amount that is due him, and not merely for the balance remaining due after realizing or valuing his security, *Kellock's Case* (\*); the reason is, that a compulsory winding up is not a proceeding subject to all the incidents of bankruptcy. The use of the terms "bankruptcy" and "administration" is misleading; \*the plaintiffs in [304 the present actions must make out that a voluntary winding up is not a proceeding for the payment of debts or for the benefit of creditors.]

It may be that a person who has been induced to take shares by fraud may be a contributory as to the creditors, but he is not a member as to the company; in a voluntary winding up the creditors are not directly concerned, and it was not intended that they should in a proceeding of that

(\*) 3 Ch. D., 749; 18 Eng. R., 794.

(\*) 34 L. J. (Ch.), 64.

(\*) Law Rep., 2 H. L., 325.

(\*) 35 Beav., 280.

(\*) 33 Beav., 123.

(\*) Law Rep., 17 Eq., 268.

(\*) Law Rep., 3 Ch., 769.

1877

Stone v. City and County Bank. Collins v. The Same.

kind be brought into immediate relation with the shareholders.

*R. V. Williams*, for the plaintiff Collins: The general scheme of a voluntary winding up, as set forth in the Companies Act, 1862, s. 129 to s. 146, shows that it is a proceeding for the benefit of shareholders: it is not a proceeding primarily for the benefit of creditors, who are scarcely mentioned in this portion of the statute.

It may be admitted for the plaintiffs, that according to the decision in *Oakes v. Turquand* <sup>(1)</sup>, a member cannot repudiate his liability to the creditors so as to get his name erased from the list of contributories, although he may have been induced to take his shares by fraud. That case was based chiefly upon the decision in *Henderson v. Royal British Bank* <sup>(2)</sup>; but the judgment of the Court of Queen's Bench proceeded upon the ground that a shareholder having held himself out as a member, cannot withdraw his name from the list of contributories; in the present action there is no estoppel as against the plaintiffs in favor of the defendants; all the assets of the company were sold to Brown, Janson & Co. at the time when the winding up was resolved upon; therefore, although the plaintiffs might be liable to pay calls for the benefit of creditors, they are not liable to contribute to the assets which are to be taken by Brown, Janson & Co. The latter are now substantially the only creditors, and as they did not become creditors upon the faith of the plaintiffs being members of the company, the reasoning in *Oakes v. Turquand* <sup>(1)</sup> does not apply: that case merely decided that a contract to take shares, though induced by fraud, cannot be avoided to the detriment of other innocent parties, and Brown, Janson & Co. having bought the assets, stand in the same position as the company.

305] \***[BRETT, L.J.:** The decision in *Oakes v. Turquand* <sup>(1)</sup> did not proceed upon estoppel, but upon the disability of the defrauded shareholder to annul the contract.]

Under the practice now established, the court may amend at any stage, *Budding v. Murdoch* <sup>(3)</sup>; and although Lindley, J., has refused to amend, yet this court may overrule his decision if he has proceeded upon a wrong principle: *Watson v. Rodwell* <sup>(4)</sup>.

*Cohen, Q.C. (Wood Hill with him)*, for the defendants:  
A voluntary winding up is a proceeding for the benefit of

<sup>(1)</sup> Law Rep. 2 H. L. 825.

<sup>(2)</sup> 7 E. & B. 336; 26 L. J. (Q.B.), 113.

<sup>(3)</sup> 1 Ch. D., 42.

<sup>(4)</sup> 3 Ch. D., 380.



creditors. In the *Brighton Arcade Company v. Dowling* (<sup>1</sup>), the Court of Common Pleas appear to have thought that a voluntary winding up was a matter which concerned only the shareholders, but that case was disapproved of in *Black & Co.'s Case* (<sup>2</sup>).

[*Cohen*, Q.C., was directed to confine his argument to the validity of the counter-claim in the action brought by Stone.]

It is only necessary to refer to the conclusion of the judgment of Lindley, J., for the purpose of showing that the liquidator has power to enforce the informal call made by the directors.

*Russell*, Q.C., was not heard in reply.

BRAMWELL, L.J.: I am of opinion that owing to the form which the proceedings in these actions have taken, the plaintiffs are not entitled to recover in respect of claims for unliquidated damages. In the action brought by Stone a special case has been stated by an arbitrator, and the questions thereby put to us are whether the plaintiff is, under the circumstances therein set forth, entitled to recover against the defendants the sum of £500 and interest, and whether the defendants are entitled to recover against the plaintiff the sum of £200 and interest. It did occur to me that the plaintiff might perhaps properly argue that the arbitrator had no right to determine what were the questions to be submitted to the court, but upon further consideration I think that the parties must be taken to have agreed that these shall be the questions, and that we ought not now to allow any other question to be discussed. In the action brought by Collins, the \*declaration is for money [306 received for his use and for interest, and by the particulars a sum of £30 is claimed, and it is plain from the subsequent pleadings that this is the sum which he was induced to part with in order to become a shareholder in the defendants' company. In neither action does the plaintiff sue for unliquidated damages, and each action is brought to recover back the money obtained from the plaintiff by the defendants' fraud. This was much the better way of presenting the claim of the plaintiff in each action, for it would be more advantageous to him to get back the money which he paid, or at least to obtain a judgment for it, with the consequence which would probably follow that he would not be liable as a contributory, than to have a judgment for damages which probably he would never be able to realize by any execution or by any proof against the defendants' as-

(<sup>1</sup>) Law Rep., 3 C. P., 175.

(<sup>2</sup>) Law Rep., 8 Ch., 254; 4 Eng. R., 880.

1877

Stone v. City and County Bank. Collins v. The Same.

sets. My Brother Lindley refused to amend ; it has been argued that we ought to amend ; but in each of the actions before us the case for the plaintiff has been shaped in a particular manner, and, as may be surmised, for a particular reason, and I think that we ought not to reverse the decision of my Brother Lindley in a matter lying wholly within his discretion. I confess that I have had misgivings as to whether we ought not to amend ; for I inclined to think that if these actions had been brought for unliquidated damages accruing from the fraud of the defendants committed through their general and authorized agents, the plaintiffs might have succeeded, and if they had succeeded, it is at least doubtful whether their claims would have been postponed to those of other creditors as being sums due to them "by way of dividends, profits, or otherwise," within the meaning of the Companies Act, 1862, s. 38, subs. 7. It is, however, unnecessary to pursue this matter further, as we have come to the conclusion that we ought not to amend.

Then arises the question whether, upon the form which the proceedings have taken, the plaintiffs are entitled to recover. The defendants contend that the plaintiffs cannot succeed because there has been a winding up, and they rely upon *Oakes v. Turquand*(<sup>1</sup>). Upon behalf of the plaintiffs it was attempted to distinguish that decision ; it was pointed out that in that case the \*company was being wound up under the supervision of the Court of Chancery, whereas the defendants' company is being wound up voluntarily. I cannot think that this circumstance makes any difference in point of principle. It was argued that a compulsory winding up, or a winding up under the supervision of the court, is in the nature of a bankruptcy or a statutory execution for the benefit of the company's creditors. I will assume that this argument is correct. But it makes no difference as to what I understand to be the principle of *Oakes v. Turquand*(<sup>1</sup>), which is this: where a company is shown by a winding-up to be insolvent, and where the remedies of the creditors, who have trusted the company upon the strength of the uncalled capital and of the names upon the register, would be interfered with by the withdrawal of members, the power to rescind a contract to take shares is gone. This principle seems to me to apply as strongly to a voluntary winding up as to a winding up under the supervision of the court. It was also contended by Mr. Williams that *Oakes v. Turquand*(<sup>1</sup>) does not apply, because Messrs. Brown, Janson & Co. are now the only creditors of the

(<sup>1</sup>) Law Rep., 2 H. L., 325.

company. I cannot assent to that. I think that the effect of the arrangement with Brown, Janson & Co. is to empower them to call upon the company or the liquidator to put in force for their benefit as purchasers of the assets all the remedies, which might have been put in force for the benefit of the creditors.

It was also contended by Mr. Whitehorne that the resolution to wind up, and therefore the winding up itself, were nullities; and the ground of his argument was that the fourth resolution passed at the meeting of the 16th of July, 1875, was bad and avoided the other resolutions. I think it a sufficient answer to this contention that the second resolution is good in itself; it simply states that the bank shall be wound up, and not that the bank shall be wound up upon the terms of the following resolutions. The second resolution is not combined with the other resolutions, but stands upon its own footing; therefore, in my opinion it is good, even if the fourth resolution is bad. I have strong doubts, however, whether the fourth resolution is bad. The objection to it is that it mis-recites the agreement of the 27th of May, and \*treats it as providing for the pay- [308] ment of the debts and liabilities of the bank, whereas in truth it was an agreement for the payment only of the debts and liabilities of the bank stated in the schedule annexed thereto; but, at the hearing before the Lords Justices, Brown, Janson & Co. undertook by their counsel to pay all the debts of the bank, and this agreement for a more extended liability appears to have cured the defect arising from the mis-recital in the fourth resolution of the 16th of July. I therefore doubt whether that resolution is open to the objections urged against it, and at all events it is not on its face *ultra vires* the company. For these reasons I think that the resolution to wind up was valid.

It was also urged before us that even if in a voluntary winding up a person, who has been induced to become a member of a company by fraud, cannot get rid of his liability by rescinding within a reasonable time his contract to take shares, and must be placed upon the list of contributories for the benefit of creditors, nevertheless as between himself and the other members of the company, with whom he has become associated through the fraud of their agents, he may be entitled to recover back the money which he has paid. I cannot assent to that argument. It seems to me to follow that a shareholder is a member of the company for all purposes, and that the remedy of a person, who has been induced to become a shareholder by fraud of the

1877

Stone v. City and County Bank. Collins v. The Same.

company, is by an action for unliquidated damages, and not by an action to recover as a debt due to him the money which he has been induced to part with. Mr. Williams contended that the reason why a defrauded shareholder is liable to the creditors of the company is that, having held himself out as a member, he is estopped from saying that he ought not to be a contributory upon the insolvency of the company. I doubt whether a shareholder is liable upon the ground of estoppel. I think his liability depends upon a principle similar to that upon which the decision in *Kingsford v. Merry* (\*) proceeded. It was there held that if the owner of goods sells them owing to a fraudulent representation, and if before he discovers the fraud another person acquires some claim to them, he cannot afterwards rescind the contract. And I think it clear \*upon the authorities that whenever the rights of other persons intervene, a contract to take shares, though induced by fraud, cannot be rescinded.

It was objected to the defendants' right to recover upon the counter-claim that the liquidator could not give notice, where and to whom a call made by directors before the winding up was to be paid, when they had omitted these particulars; it is sufficient to say that I think that he could give such a notice.

I will state briefly the conclusions at which I have arrived: I think that the resolution to wind up voluntarily is good, and that the principle of *Oakes v. Turquand* (\*) shows that where a company is being wound up either compulsorily, voluntarily, or under the supervision of the court, it is too late to rescind a contract to take shares, although that contract has been induced by fraud. I therefore am of opinion that judgment must be given for the defendants.

BRETT, L.J.: I agree that we ought not to allow any amendments in these actions. I am of that opinion because neither of them was really brought to recover damages for fraud; they were brought and were substantially contested on the ground that the plaintiffs were entitled to rescind the contracts to take shares and to recover back the prices paid for them, and I think that when actions have been brought and contested in order to enforce one remedy, the court is not called upon, and in exercise of its discretion ought not to amend so as to give substantially a new remedy. I may add that in my opinion Lindley, J., was right in refusing to amend.

But the question arises whether the plaintiffs can recover

(\*) 11 Ex., 577.

(\*) Law Rep., 2 H. L., 325.

for unliquidated damages without any amendment. In the action brought by Stone the questions stated for the opinion of the court must be taken to have been agreed upon by the parties when the special case was stated; and these questions do not allow the plaintiff to claim unliquidated damages. In the action brought by Collins, the defendants by their second plea admit that by their directors they have made fraudulent representations to induce the plaintiff to take shares; but I do not think that an admission of fraud, \*made merely for the purpose of defeating the plain- [310  
tiff's claim, is enough to entitle him to treat the action as one for unliquidated damages, he having by the declaration asked for a different remedy. I think, therefore, that owing to the manner in which the proceedings in the present actions have been shaped the plaintiffs cannot recover for unliquidated damages without an amendment, which, as I have before said, ought not to be made.

We must, therefore, treat both actions as based upon claims by the plaintiffs to rescind the contracts to take shares in the defendants' company and to recover back the prices paid for them. I am of opinion that upon the facts proved in one case and stated in the other the plaintiffs could not rescind the contracts after the voluntary winding up had commenced. In my opinion *Oakes v. Turquand* <sup>(1)</sup> really decided that upon the true construction of the Companies Act, 1862, the members of a company, although they have been induced to take shares by fraud, are prevented from rescinding their contracts after the winding up has commenced. A voluntary winding up commences when the resolution to wind up is passed; and therefore, after that time, a shareholder cannot escape from liability to contribute to the payment of the company's debts.

But in order to take these actions out of the principle laid down in *Oakes v. Turquand* <sup>(1)</sup> ingenious arguments have been put forward: First, it was contended that according to the Companies Act, 1862, upon a voluntary winding up the assets of the company must be distributed ratably among the creditors, and that the terms of the winding up of the defendants' company were inconsistent with the intention of that statute, because that winding up was founded upon the agreement with Brown, Janson & Co., and that agreement did not bind them to pay the plaintiffs if they could succeed at some future time in establishing their claims for damages. I am prepared to hold that even although this were the effect of the agreement with Brown, Janson & Co., it

<sup>(1)</sup> Law Rep., 2 H. L., 325.

would not render the resolution to wind up a nullity; that resolution was in other respects passed according to the Companies Act, 1862; and the winding up under it must be taken to be valid, at all events until some court of competent jurisdiction shall supersede the \*proceedings and order a winding up under supervision or a compulsory winding up. Therefore the resolution to wind up is binding upon the plaintiffs. It is unnecessary to consider what is the effect of the agreement with Brown, Janson & Co., as modified by what took place before the Lords Justices: they were then represented by counsel, and the undertaking then given was entered into in order to induce the court to act, and did induce the court to act; it is true that Brown, Janson & Co., by the document of the 27th of May, agreed to pay only the debts and liabilities of the bank stated in the schedule thereto, but it seems to me possible to say that they must be taken in the end to have agreed to pay, not only all existing or scheduled debts and liabilities of the company, but also all future debts and liabilities which may become provable against the company, and therefore that they will be bound to satisfy the claims of the present plaintiffs for unliquidated damages when the latter have turned these claims into debts by obtaining judgments. At the present moment, however, I only desire to say that I wish to treat the liability of Brown, Janson & Co. to the plaintiffs as an open question.

Secondly, it was contended that these actions were distinguishable from *Oakes v. Turquand* (<sup>1</sup>), because that was not a decision between a shareholder and a company, but a decision between a shareholder and the creditors of a company, and because the liability of a shareholder in favor of the creditors was put upon the ground of estoppel. But in my opinion the judgment in *Oakes v. Turquand* (<sup>1</sup>) did not proceed upon the ground of estoppel, nor did it proceed upon the ground that a compulsory winding up or a winding up under supervision is to be considered as in the nature of a bankruptcy, and that a voluntary winding up is to be considered as in the nature of an administration suit. I am of opinion that the judgment in *Oakes v. Turquand* (<sup>1</sup>) cannot be said to be a decision as between a shareholder and creditors, but that it was a decision between a shareholder and the liquidator of the company representing the company; the true reason of the decision seems to me to be that the existence of the creditors prevents a member, although he has been induced to take his shares by fraud, from

(<sup>1</sup>) Law Rep., 2 H. L., 325.

rescinding his contract after the commencement of a winding \*up under the Companies Act, 1862, whatever [312 may be the nature of that winding up; and if he continues a member, and if his name remains upon the register, of course he can be made a contributory. The reasoning in *Oakes v. Turquand* <sup>(1)</sup> seems to me to apply just as much to a voluntary winding up as to a compulsory winding up or a winding up under supervision; none of these kinds of winding up are to be deemed bankruptcies; they are all modes of dealing with companies in difficulties to be substituted for proceedings in bankruptcy, and they all fall within the principle of *Oakes v. Turquand* <sup>(1)</sup>. I am, therefore, of opinion that neither plaintiff can recover in respect of the claim which he has put forward.

As to the counter-claim in the action brought by Stone, I am of opinion that it is valid, and that the defendants are entitled to succeed upon it.

COTTON, L.J.: I think it unnecessary to add anything on the question whether leave to amend should have been given by Lindley, J., and should now be given by us, except this, namely, that although, under ordinary circumstances, the widest liberty of amendment ought to be allowed, so that the real question between the parties may be decided without further litigation, yet in these actions, for the reasons stated by the Lords Justices, the learned judge was right in refusing to amend, and we ought not now to give liberty to amend.

I have no doubt that the question really intended to be raised in these actions was, whether the plaintiffs could rescind their contracts with the company by which they became shareholders: it seems plain that this was the question at issue between the parties, because the actions are brought to recover the sums paid for the shares as money received for the use of the plaintiffs, and can be maintained in this form only upon the ground that the plaintiffs are at liberty to say that they are not shareholders. If the company were solvent the plaintiffs would probably be entitled to contend that they are not members: but as a bar to the relief claimed, the defendants rely upon the voluntary winding up. The plaintiffs' counsel have argued that the winding up is a nullity: but there is a distinction between its being voidable and its being \*a nullity: possibly the [313 points urged on their behalf may form good reasons for inducing the Chancery Division, on a petition for winding up compulsorily, to supersede the voluntary winding up, and

<sup>(1)</sup> Law Rep., 2 H. L., 325.

1877

Stone v. City and County Bank. Collins v. The Same.

to make an order for a compulsory winding up; but that is not a matter before us, and I think it impossible to say that the voluntary winding up is a nullity; for a general meeting has passed valid resolutions for that purpose. The first and second resolutions relate to the winding up, and are in themselves good: they at least cannot be treated as nullities, whatever may be said of the fourth resolution confirming the agreement to hand over the assets of the bank to Brown, Janson & Co., for the purpose of carrying out the arrangement which had been entered into. I look upon the resolutions as separate: some may be bad and others good: and the resolutions to wind up are independent of the rest and cannot be impeached, because some other resolution may be bad.

Then comes the question whether the winding up is a bar to rescinding the contracts to take shares. In order to see how far *Oakes v. Turquand* (') (which of course we must follow) is applicable to this case, we must consider what relief the plaintiffs in these cases are seeking to obtain. In both cases they are seeking to recover back money which they have paid, and the ground upon which they claim relief is that they were induced to become members of the company by fraud. In *Oakes v. Turquand* (') the appellant, upon the same ground, claimed to have his name removed from the list of contributories. In these actions, as in that case, there was but one contract from which relief was sought, namely, a contract with the company. If in that case the House of Lords had held that the contract might be rescinded, the name of the appellant would have been taken off the list of contributories, and the plaintiffs in these actions would have been entitled to recover back the money which they have paid to the company for their shares; but as the House of Lords decided in that case that the contract could not be rescinded, we must determine whether a voluntary winding up is within the principle of that case. It is very true that in that case the ground of refusing to allow the appellant to rescind his contract with [314] the company was \*that the rights of creditors had arisen, that is to say, proceedings were being taken under the Companies Act, 1862, to pay them. In the present actions surely the same objection applies to the rescission of the contracts with the company. It is true that there is a difference in the mode of winding up: in compulsory winding up, or in winding up under the supervision of the court, the creditors can take part in the proceedings, and can at all

(') Law Rep., 2 H. L., 325.



times apply to the court; whereas, in a voluntary winding up, the creditors can only change a voluntary winding up into a winding up subject to supervision, or into a compulsory winding up. In these actions the voluntary winding up was founded upon a declaration under the Companies Act, 1862, s. 129, that it had been proved to the satisfaction of the shareholders assembled in general meeting that the company could not by reason of its liabilities continue its business, and that it was advisable to wind it up. That was practically a declaration of insolvency. What were the consequences? Section 133 clearly imposes upon the liquidator the duty of immediately providing for the distribution of the assets amongst the creditors; and therefore a voluntary winding up, as much as a compulsory winding up, does render it imperative in the first instance to apply the assets in payment of the company's debts; and amongst those assets, which under s. 133, subs. 1, are to be distributed in the first instance in paying the debts, are to be included any unpaid calls. According to *Oakes v. Turquand* (<sup>1</sup>), no person, who at the commencement of the winding up is *de facto* a member, that is, who has by a contract not previously avoided become a member, can withdraw from the distribution for the benefit of the creditors any part of the company's assets, either by recalling money paid by him to the company or by taking himself off the list of contributories, that is to say, by taking himself out of the category of those liable to pay further calls: in consequence of the distribution of assets amongst the creditors a member cannot insist upon the equity which he might otherwise have claimed to be relieved from his contract with the company. I think that the principle of *Oakes v. Turquand* (<sup>1</sup>) applies to this case. Reference was made to certain cases where actions at law against companies were stayed when they were \*being voluntarily wound up, [315 although the Companies Act, 1862, does not contain any express power to do so, and in some of these cases the late Master of the Rolls likened a voluntary winding up to an administration suit: an administration suit does not necessarily imply insolvency, and hence it was argued that a voluntary winding up is not, at least primarily, a proceeding for the benefit of creditors. I think that the counsel for the plaintiffs did not sufficiently consider that it was not the mere existence of an administration suit, which enabled an executor to obtain a stay of actions at law against him, but that it was the existence of a decree providing for the dis-

(<sup>1</sup>) Law Rep., 2 H. L. 325

1877

Stone v. City and County Bank. Collins v. The Same.

tribution of the assets amongst all the creditors: therefore a voluntary winding up is like an administration suit in which a decree has been made for the benefit of all the creditors: and it is the intervention of the creditors' rights which in the one case entitles an executor to relief, and which in the other bars proceedings against an insolvent company. This analogy very much strengthens the view which I take of the position of a company when there has been a resolution for a voluntary winding up. In my opinion the decision in *Oakes v. Turquand* (\*) applies to a voluntary winding up; and since this voluntary winding up is founded upon a valid resolution, it is a bar to these actions which are brought to enforce a supposed right to rescind the plaintiffs' contracts to take shares.

I will say a few words about the agreement of the 27th of May, 1875. It was not for the sale, in any reasonable sense of the word, of the assets of the bank to Brown, Janson & Co., it was an agreement made with them to provide for the speedy payment of the company's debts; and, so far as appears, that agreement has been fulfilled. It is true that all the assets of the company were to be handed over to Brown, Janson & Co., but that was to recoup them for the money which they should expend; the arrangement is not unusual, and has been made in other instances. This being the real nature of the arrangement, to my mind, it would not be right to hold that the position of the plaintiffs can be improved, because the assets of the company were not in the first instance to be paid to the creditors, but were to be handed over to persons who undertook to discharge the debts [316] and liabilities of the bank. \*For all practical purposes, the shareholders must be taken to have been represented at the appeal before the Lords Justices upon the 28th of June, and liberty was given to the defendants to call a meeting of the shareholders for the purpose of considering the agreement of the 27th of May with Brown, Janson & Co.; and it would almost have amounted to a failure of justice, if we had been bound to accede to the claims of the plaintiffs in these actions on the ground, that the resolutions to wind up voluntarily were bad, or that the existence of that agreement gave them rights which they would not otherwise have had.

*Judgment affirmed in each action.*

Solicitors for plaintiff in each action: *Harper, Broad & Battcock.*

Solicitors for defendants: *Janson, Cobb & Pearson.*

(\*) Law Rep. 2 H. L. 525.

Stone v. City and County Bank. Collins v. The Same.

1877

See 1 Eng. Rep., 611 note; 4 id., 16 note; 12 id., 628 note; Id., 699 note.

In equity, a contract to take shares of stock will not be enforced *in a suit by the corporation*, if induced by fraud in a prospectus or fraudulent representations: New Brunswick, etc., v. Muggeridge, 1 Dr. & Sm., 363; Ætna, etc., v. Shiels, Irish Rep., 7 Eq., 264; Upton v. Englehart, 3 Dillon, 496, 506 note; McCarty v. Selingsgrove, 87 Penn. St. R., 332; Vreeland v. N. J. Stone, 29 N. J. Eq., 189, and note; Rutz v. Esler, 3 Bradw., 83; Grangers, etc., v. Turner, 61 Geo., 561.

See, however, S. M., etc., v. Anderson, 51 Miss., 829; Mervin v. Lamar, 80 Ills., 446; Miller v. Hanover, etc., 87 Penn. St. R., 95.

The subscriber has a right not only not to be misled by any statements actually false, but to be informed of all the facts, the knowledge of which might reasonably have deterred him from entering into the contract. If the prospectus in that sense contains misrepresentation, or the absence of true representation, the contract will not be enforced: New Brunswick, etc., v. Muggeridge, 1 Dr. & Sm., 363.

An assignee of a mortgage, to secure stock fraudulently induced to be subscribed for, cannot recover if not a *bona fide* holder: Sawyer v. Prichett, 19 Wall., 146; Davis v. Dumont, 37 Iowa, 47.

As against a creditor of the corporation, or a receiver who represents creditors, it is no defence that the party was induced to subscribe for the stock by fraud: Northrop v. Bushnell, 38 Conn., 498; Miller v. Wild Cat, etc., 52 Ind., 52; Michener v. Payson, 13 Nat. Bankr. Reg., 49.

See McCarty v. Selingsgrove, etc., 87 Penn. St. R., 332.

A fraudulent resolution, on the eve of insolvency, that all stockholders who paid five per cent. of subscription should be released, is invalid: Gill v. Balis, 72 Mo., 424; Rutz v. Esler, 3 Bradw., 83.

So for stocks subscribed for under an agreement that the subscription may be withdrawn: Melvin v. Lamar, 80 Ills., 446; Miller v. Hanover, etc.,

87 Penn. St. R., 95; Wilson v. Ginty, 3 U. C. App. R., 124; Upton v. Tribelcock, 91 U. S. R., 45; Sanger v. Upton, Id., 56; Webster v. Upton, Id., 65; Chubb v. Upton, 95 id., 665.

Nor is a settlement of an alleged fraud between the stockholder and the corporation a defence, in a suit by a receiver representing a creditor, to recover an unpaid balance upon the stock: Northrop v. Bushnell, 38 Conn., 498.

A stockholder who subscribes for his stock under an agreement with the secretary of the company, that the company will "redeem" his stock at any time at par and ten per cent. interest, and for payment assigns a mortgage with a collateral policy of insurance, payable, in case of loss, to the company, cannot, after loss and payment to them, and the insolvency of the company, recover the amount from the insolvent company, as against *bona fide* stockholders and creditors; it appearing that the object of the transaction was to give the company credit before the public: Eisenlord v. Oriental Ins. Co., 29 N. J. Eq., 437.

Where agents of a corporation practice a fraud in inducing one to subscribe for stock, they are personally liable for such fraud: Vreeland v. N. J. Stone, 29 N. J. Eq., 188.

Where one delivers his subscription to stock as an escrow he is estopped, by voting upon the stock, from claiming the delivery was not full and effectual: Griswold v. Seligman, 72 Mo., 110; Wilson v. Ginty, 3 U. C. App. R., 124; Rutz v. Esler, 3 Bradw., 83.

A subscription to railroad stock was "on condition that in the judgment of the directors \* \* \* a sufficient amount is subscribed \* \* \* to grade and bridge the road, including right of way; \* \* \* otherwise, these subscriptions shall be void." The directors passed a resolution, that in their "judgment \* \* \* sufficient stock had been subscribed," etc. Held, if the board acted in good faith in passing the resolution, the condition was performed: Cass v. Pittsburg, Virginia and Charleston Railway Company, 30 Penn. St. R., 81.

1878

Usill v. Hales.

[3 Common Pleas Division, 319.]

Jan. 30, 1878.

319]

\*USILL V. HALES.

USILL V. BREARLEY.

USILL V. CLARKE.

*Libel—Privileged Publication—Ex parte Proceeding before a Police Magistrate in a Matter over which he has no Jurisdiction.*

Three men who believed themselves to be aggrieved by the conduct of the plaintiff in respect of a supposed claim upon him for wages or salary, applied to a magistrate in open court for a summons under the Master and Workman's Act. The magistrate declined to entertain the application, considering it a matter for a civil and not for a criminal court. The defendant afterwards published in a newspaper a report, which the jury found to be a fair report, of what passed before the magistrate:

*Held*, a privileged publication.

ACTIONS for libels published in the *Daily News*, the *Standard*, and the *Morning Advertiser*, respectively. The publication complained of consisted of a report of an application, made in public to a police magistrate in London, for a summons against the plaintiff under the following circumstances: The persons by whom the application to the magistrate was made were respectively civil engineers or surveyors who had been employed under the plaintiff, a civil engineer, in making surveys, &c., for a projected railway in Ireland. The applicants having heard that the plaintiff had been paid by the promoters for his services, and conceiving that he had improperly withheld from them the money which was due to them for theirs, made an *ex parte* application to the magistrate under the Master and Servant's Act. The magistrate, after hearing the statement of the parties, came to the conclusion that he had no jurisdiction to entertain the matter, and declined to grant the summonses. A report of the proceeding appeared in each of the newspapers in question on the following morning, in these terms,—

“Three gentlemen, civil engineers, were among the applicants to the magistrate yesterday, and they applied for criminal process against Mr. Usill, a civil engineer, of Great Queen Street, Westminster. The spokesman stated that they had been engaged in the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in 320] their various capacities, although \*from time to time they had received small sums on account; and, as the person complained of had been paid, they considered that he had been guilty of a criminal offence in withholding their

money. Mr. Woolrych said it was a matter of contract between the parties; and, although, on the face of the application, they had been badly treated, he must refer them to the county court."

The cause was tried before Cockburn, C.J., at Westminster, on the 15th of November, 1877. The learned judge told the jury that the only question for their consideration was whether or not the publication complained of was a fair and impartial report of what took place before the magistrate; and that, if they found that it was so, the publication was privileged.

The jury found that it was a fair report of what occurred, and accordingly returned a verdict for the defendant in each case.

Nov. 20, 1877. *Ballantine, Serjt.*, obtained rules *nisi* for new trials on the ground of misdirection. He contended that the publication being a report of an *ex parte* application to a functionary who had no jurisdiction to entertain it, and against one who had no means of answering the charges made against him, the privilege usually accorded to the publication of proceedings in a court of justice did not attach to it.

Jan. 29 and 30, 1878. *Sir H. Giffard*, S.G., *Bremner*, *Yelverton*, *Barnard*, and *Child*, showed cause: The publication was privileged. *Ex parte* applications to a superior court may undoubtedly be reported, *Curry v. Walter* (1); *Rex v. Wright* (2); and no distinction exists between such applications and similar proceedings before a magistrate sitting in public: *Lewis v. Levy* (3). Privilege has of late years been denied to such reports on two grounds only, viz. where they have been accompanied by injurious comments, and where the proceeding was not final. Here, the reporter abstained from comment upon the case, but gave, as the jury found, a fair report of it; and the proceeding terminated on the magistrate dismissing the applicants. "It is now well established that faithful and fair reports of the proceedings of courts of justice, though the [321] character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible:" per Cockburn, C.J., in *Wason v. Walter* (4). They "only extend that publicity which is so important a feature in the administration of the law of England, and thus enable to be

(1) 1 B. & P., 525.

(2) 8 T. R., 293.

(3) E. B. & E., 537; 27 L. J. (Q.B.), 282.

(4) Law Rep., 4 Q. B., 73, 87.

witnesses of it, not only the few whom the court can hold, but the thousands who can read the reports:" per Wilde, B., *Popham v. Pickburn* <sup>(1)</sup>. See also *Ryalls v. Leader* <sup>(2)</sup>.

[LORD COLERIDGE, C.J.: I can understand that necessity for full investigation which is the reason for protecting persons who even abuse their privilege of speech in courts of justice; but I do not quite see the advantage the public can gain from the publication of what is said in abuse of the privilege. Can you cite a case where the report of an application to an inferior court in a matter beyond its jurisdiction has been held to be privileged?]

The magistrate had at least jurisdiction to inquire whether or not the matter of the complaint was one which he could further entertain. But, although it was held in *Buckley v.*

*Wood* <sup>(3)</sup>, that, if a charge is made against a man in a court which has no jurisdiction, an action for defamation lies, yet in the subsequent case of *Lake v. King* <sup>(4)</sup>, the court said that, notwithstanding what is reported in 4 Rep., 14 b, in *Buckley's Case*, it was held that want of jurisdiction will not make a libel.

*Ballantine, Serjt.*, and *J. Shortt*, in support of the rule: The report in question was not privileged. If the doctrine of privilege is based on the supposed benefit to the community resulting from the publicity of trials, no advantage to the public could be shown in the present case. The application was one which the magistrate could not grant. *Curry v. Waller* <sup>(5)</sup> was never finally decided, and was said by Abbott, C.J., in *Duncan v. Thwaites* <sup>(6)</sup>, not to have received the sanction of subsequent judges. In *Lewis v. Levy* <sup>(7)</sup> Lord Campbell said: "As to magistrates, if, while occupying the bench from which magisterial business is 322] usually administered, they, under pretence of giving advice, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, reports of what passes before them are as little privileged as if they were illiterate mechanics assembled in an alehouse." The magistrate had not jurisdiction here to grant the summons asked for, and the application was substantially for advice only. No case has been cited where the report of an ex parte application dismissed was held to be privileged. The only proposition established by *Lewis v. Levy* <sup>(8)</sup>,—the case most favorable to

<sup>(1)</sup> 31 L. J. (Ex.), 133, 136.

<sup>(2)</sup> Law Rep., 1 Ex., 296, 299.

<sup>(3)</sup> 4 Rep., 14 b.

<sup>(4)</sup> 1 Vin. Abr., 389.

<sup>(5)</sup> 1 B. & P., 525.

<sup>(6)</sup> 3 B. & C., 536, 583.

<sup>(7)</sup> E. B. & E., 537, 554.

<sup>(8)</sup> E. B. & E., 537; 27 L. J. (Q.B.), 282.

the defendants,—is, that the reports of proceedings rightly taken in a court of competent jurisdiction may be privileged. There, the court had power to hear the charge, and evidence was given on oath. Not so in the present case. Can it be contended that any statement, however false and defamatory, made to a magistrate in open court may lawfully be published and its injurious effect thereby immeasurably increased? Between motions for criminal informations in the Queen's Bench Division and applications such as that made by the parties here three distinctions exist,—1, the Queen's Bench has jurisdiction to grant a criminal information,—2, the application must be supported by affidavit,—3, it *must* be made by counsel, who are not likely to misuse their right of speech: see *Rex v. Brice* ('). "The publication of proceedings in courts of justice, *where both sides are heard and matters are finally determined*, is salutary, therefore it is permitted:" per Lord Ellenborough, C.J., in *Rex v. Fisher* ('). The whole subject was discussed in *Duncan v. Thwaites* ('), where Abbott, C.J., delivering the judgment of the Court of King's Bench, said: "This court has on more than one occasion within a few years been called upon to express its opinion judicially on the publication of preliminary and ex parte proceedings, and has on every occasion delivered its judgment against the legality of such proceedings."

And so late as the year 1850, Maule, J., excepts the publication of ex parte proceedings from those which are justifiable: *Hoare v. Silverlock* ('). So, in *Davison v. Duncan* ('), \*Coleridge, J., said: "Now, if the publication be a fair account of a proceeding not ex parte in a court of justice, it is privileged." Suppose a man were to go before a magistrate and ask for criminal process against another for the seduction of his wife or daughter; would a report of such an application,—which the magistrate could not entertain, and which therefore would be a proceeding without legitimate beginning or ending, but whose only object could be to vilify and defame the accused,—be a privileged publication? And yet it must be so if the argument on the other side is to prevail. [*Saunders v. Mills* (') and *Kane v. Mulvaney* (') were also referred to.]

LORD COLERIDGE, C.J.: I am of opinion that this rule must be discharged. There were three several rules, but

(') 2 B. & A., 606.

(\*) 9 C. B., 20, 23.

(') 2 Camp., 563.

(\*) 7 E. & B., 229, 232.

(') 3 B. & C., 556.

(\*) 6 Bing., 213.

(') Ir. Rep., 1 C. L., 402.

1878

Usill v. Hales.

only one has been argued, it having been agreed that the judgment in the first case should bind the parties in the other two.

This was an action against the proprietor of a newspaper for publishing a *bona fide* and fair report of proceedings before a magistrate. Three persons, surveyors, who had been employed by a civil engineer to assist in the construction of a railway in Ireland, hearing that their employer had been paid, and conceiving that the money due to them had been improperly withheld by him, went before a police magistrate in London, and (I must take it for the purpose of my judgment, and do so take it) applied to him for a summons or order under the Master and Workman's Act. In the result, the magistrate thought that the facts stated by the complainants showed no ground for a summons against the plaintiff under the act; and therefore in the result it turned out that, in a certain sense, an application had been made to the magistrate with regard to a matter as to which he had no jurisdiction. I say in a certain sense: but it has been long held, and I think most properly held, that it is not the result but the nature of the application made to the magistrate which founds his jurisdiction; and that, wherever an application is made to a magistrate as to a matter over which, supposing the facts to bear out the statement, he has jurisdiction, he then has jurisdiction to ascertain whether the facts make out a case for the exercise of that jurisdiction \*which, if the facts make out the case, undoubtedly he has. And the distinction between a real and inherent want of jurisdiction on account of the nature of the complaint, and what may be called resulting want of jurisdiction because the facts do not make out the charge, is very well explained, in language far better than I can use, in the well known case of *Reg. v. Bolton* <sup>(1)</sup>; and that case is founded mainly upon the very celebrated case of *Brittain v. Kinnaird* <sup>(2)</sup>. The luminous judgment of Sir John Richardson in that case has long been considered the *locus classicus* on this subject. I must therefore take it that the magistrate had jurisdiction to enter upon the inquiry: consequently what was done during the inquiry which the magistrate had jurisdiction to initiate was a matter which can only be described as a judicial proceeding; it was a proceeding before a judge who had, so far as that proceeding went, jurisdiction to hear and entertain it. That seems to be clear upon principle and upon authority. If so, the

<sup>(1)</sup> 1 Q. B., 66.

<sup>(2)</sup> 1 B. & B., 432.



publication in question was *prima facie* a privileged publication, because it was a publication, found by the jury to be fair and *bona fide*, of a judicial proceeding; and it is too late now to dispute whether the rule of privilege does or does not extend to the publication of such proceedings.

It has been laid down again and again in broad terms that the publication of the proceedings in courts of justice is privileged if the report of such proceedings be fair and honest; and this is so found to be. An attempt however has been made (and Mr. Shortt will allow me to say that, if it were possible to have succeeded, I think his argument would have succeeded, because he has said everything that could be said, and has said it well,) to distinguish this case and take it out of the general proposition, by bringing it within an undoubted qualification which has been grafted upon that general proposition, viz., that the application to the magistrate here was what may be called an *ex parte* or a preliminary proceeding. Now, there is no doubt that, in many cases to which Mr. Shortt has referred, the term "*ex parte* proceeding" has been over and over again used by judges of great eminence, sometimes affirmatively to say that an *ex parte* proceeding is not privileged, and sometimes negatively to say, this, being a proceeding not *ex parte*, is privileged; and I do not doubt for my own [325 part that, if this argument had been addressed to a court some sixty or seventy years ago, it might have met with a different result from that which it is about to meet with to-day. Speaking frankly,—and it is useless, if a case has made a certain impression upon your mind after you have done the best you can to understand it, to say it has not made that impression,—it seems to me quite plain that in such cases as *Rex v. Fleet* <sup>(1)</sup> judgments of great judges do lay down the rule that an *ex parte* or preliminary proceeding is not privileged on the ground, good or bad, that it is very hard upon an individual to have a matter stated against him behind his back which he has no means of answering; and that oftentimes an accused person will come to trial, if he be tried, with a heavy weight of prejudice; where the case against him has been reported in the public newspapers, and his own answer, if he has one, from the necessities of the case has not been similarly made known. No doubt there are very strong observations in those cases adopted in *Duncan v. Thwaites* <sup>(2)</sup> which go very far to maintain that proposition. There is also a dictum of one of the greatest

<sup>(1)</sup> 1 B. & A., 379.  
30 ENG. REP.

<sup>(2)</sup> 3 B. & C., 556.

1878

Usill v. Hales.

authorities in our law, Lord Eldon, than whom few greater lawyers have ever sat in Westminster Hall, who is reported, by Mr. Starkie<sup>(1)</sup>, to have once observed that he recollected the time when it would have been matter of surprise to every lawyer in Westminster Hall to learn that the publication of *ex parte* proceedings was legal.

But we are not now living, so to say, within the shadow of those cases: and it is idle to deny that there are cases since that time, in which the decisions I have just now referred to have been brought to the attention of the learned judges, where the courts have been pressed with the authority of those decisions, and have come to conclusions which it is not for me to say are inconsistent, but which I am perfectly unable to reconcile with those earlier cases: and I find what I think is excellent good sense in the judgment of the Court of Queen's Bench in the case of *Wason v. Walter*<sup>(2)</sup>, which explains how that is. It is a passage which one of the learned counsel read to us, and it is a passage which upon the whole I should desire to adopt and adhere 326] to: "Whatever \*disadvantages attach to a system of unwritten law,—and of this we are fully sensible,—it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society and to the requirements and habits of the age in which we live, so as to avoid the inconveniences and injustice which arise where the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized." And then the passage goes on,—“Even in quite recent days judges, in holding the publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what we call *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of; and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken

(1) Starkie on Libel, 4th ed., p. 191 (9).

(2) Law Rep., 4 Q. B., 73

place, published simply with a view to the honest publication, and innocent of all intention to do injury to the reputation of the party affected." Now, to the general line of argument in that passage, and to the accuracy of the statement in the last sentence I have read, I entirely adhere; and it is familiar that not only are unimportant cases and *ex parte* proceedings published, but a particular class of inquiries which in some of the earlier cases I find actually by name excluded from the privilege,—I mean inquiries before a coroner,—are in cases which may be supposed to interest the public reported in all the newspapers in the kingdom; and yet no one ever heard, at least since I have known Westminster Hall, of an action being brought by a person injuriously affected by such publication, where the report is honest and *bona fide*, and published without intention to injure. That, therefore, seems to introduce this element into the \*determination of these cases, that [327 there is a certain elasticity in the rules which apply to questions of privilege (development is perhaps the more correct expression), and that the courts have from time to time applied as best they may what they think is the good sense of the rules which exist to cases which have not been positively decided to come within them. If there had been a case directly in point in which a proceeding such as this, where the matter was at an end, and where the publication had been found by the jury to have been *bona fide* honest, and fair, had been held by a court of co-ordinate jurisdiction not to be privileged, I do not hesitate to say for my own part that I should have gladly acted upon it, because I do not disguise that my own judgment is not at all satisfied with the enormous advantage to the public of having every small personal matter reported day by day, often to the extreme pain and injury of individuals, which is supposed to form its justification. Nevertheless, I feel it to be the duty of a judge not to declare what he considers the law ought to be, but to decide according to what to the best of his judgment he finds it is: and, if he finds a principle laid down upon competent authority, it is far better to accept and apply it broadly and honestly, even if he is not in his own mind satisfied with the foundation of the rule, than to attempt to fritter it away in its application to cases which manifestly come within it.

I come therefore to the consideration of this case feeling that the general tendency of the law has been to hold such a publication as this to be within the protection of the privilege. Now, I do find one case which to the best of my

1878

Usill v. Hales.

judgment appears to cover this case, and from which I am unable, according to the principle laid down in it, to distinguish the case now before us. It is a case to which much reference has been made, and which Mr. Shortt has dealt with at considerable length, viz., *Lewis v. Levy* (<sup>1</sup>); and it has no doubt a most important bearing upon this question. I do not propose to read the elaborate judgment delivered by Lord Campbell in that case: it is well summed up in these words,—“The rule, that the publication of a fair and correct report of proceedings taking place in a public court of justice is privileged, extends to proceedings taking place 328] publicly before a \*magistrate on the preliminary investigation of a criminal charge terminating in the discharge by the magistrate of the party charged.” I am perfectly aware that there may be subtle distinctions,—distinctions which I will not say are merely shadowy, but which are subtle,—between the facts of that case and those of the case now before us: but I cannot disguise from myself that the *ratio decidendi* and the argument by which the court was there led to hold such proceedings to be privileged, do in effect cover this case. I am of opinion that this is a case in which there was a judicial proceeding terminating, not in the discharge of the party accused, because there was no such person before the magistrate, but terminating in a refusal to proceed with the charge and to set the criminal process in motion. I am unable to distinguish the principle of *Lewis v. Levy* (<sup>1</sup>) from that involved in the present case: and I adopt what is said there (<sup>2</sup>) of the old,—and I may say great case, because it was decided by judges of high authority,—of *Curry v. Waller* (<sup>3</sup>), so far back as the year 1796. That case is adopted by the Court of Queen’s Bench in a written judgment in the year 1858, as a ground of their decision; and, whatever may have been said about it in some of the intermediate cases, and the doubts that have been thrown upon it by some eminent judges, it must I think be considered to be completely rehabilitated by the judgment of the Court of Queen’s Bench in *Lewis v. Levy* (<sup>1</sup>). I am content, therefore, to rest my judgment in this case upon the principles laid down in *Curry v. Waller* (<sup>3</sup>) and deliberately reaffirmed in *Lewis v. Levy* (<sup>1</sup>), and to say that, upon the principles there laid down, I am of opinion that this rule must be discharged.

LOPES, J.: In this case three men who believed themselves aggrieved by the conduct of the plaintiff in respect

(<sup>1</sup>) E. B. & E., 537; 27 L. J. (Q.B.), 282.

(<sup>2</sup>) E. B. & E., at p. 559.

(<sup>3</sup>) 1 B. & P., 525.

of the payment of their wages, applied to a magistrate in open court for a summons under the Master and Workman's Act. The magistrate refused the application, considering it a matter for a civil and not for a criminal court. The defendant afterwards published a report which the jury have found was a fair report of what occurred.

On principles of public convenience, the ordinary rule is that \*no action can be maintained in respect of a [329 fair and impartial report of a judicial proceeding, though the report contain matter of a defamatory kind and injurious to individuals.

It was urged that the matter in respect of which the application was made was not within the jurisdiction of the magistrate. But the cases are clear to show that want of jurisdiction will not take away the privilege, if it is maintainable on other grounds. Nor do I think the privilege is confined to the superior courts: it is not the tribunal, but the nature of the alleged judicial proceeding which must be looked at.

The point mainly relied on by the plaintiff was, that the application to the magistrate was *ex parte*, and as such could not be privileged.

Had the matter before the magistrate been in the nature of a preliminary inquiry, and if the ultimate judicial determination was to remain in abeyance until a further investigation, I should have thought there was authority at any rate for the plaintiff's contention, though how far those authorities might be followed in the present day I think doubtful. But the matter of the application was *finally* disposed of by the magistrate; and I can find no case where a fair report of a judicial proceeding *finally* dealing with the matter in open court has been held libellous. There are authorities which, until they are carefully examined would seem to support the contention that an *ex parte* proceeding in court is not privileged. So far as I can ascertain, these are all cases where the proceeding was *preliminary*, and where there was no *final* determination at the time of the alleged libellous report. On the other hand, *Curry v. Walter* (\*) and *Lewis v. Levy* (†) are strong authorities in favor of the report in this case being protected.

*Rule discharged.*

Solicitors for plaintiff: *Carr, Fulton & Co.*

Solicitors for defendant Hales: *Ashurst & Morris.*

Solicitor for defendant Brearley: *J. Goren.*

Solicitors for defendant Clarke: *H. J. & T. Child.*

(\*) 1 B. & P., 525.

(†) E. B. & E., 57; 237 L. J. (Q.B.), 282.

[3 Common Pleas Division, 330.]

Feb. 15, 1878.

[IN THE COURT OF APPEAL.]

**330] \*YGLESIAS V. THE MERCANTILE BANK OF THE RIVER PLATE.***Bill of Exchange—Discharge of Parties from Liability on Bill of Exchange—Principal Debtor.*

The plaintiff obtained from the defendants an advance of £15,000 upon the security of goods then in transit to Monte Video consigned to one S., and also of six bills of exchange drawn by the plaintiff upon and accepted by S., against the shipments. The plaintiff authorized the defendants, on the non-payment of the bills, to realize the goods, and held himself responsible for any deficiency. Two of these bills were duly paid; but other two having been dishonored, the defendants (at Monte Video) proposed to realize the goods at once, whereupon the plaintiff gave them a check for £2,500 accompanied by a letter requesting them not to sell, and authorizing them to hold the £2,500 as collateral security for S.'s acceptance to be returned to the plaintiff when all the bills should have been paid. The remaining bills having also been dishonored by S., the defendants took proceedings against him at Monte Video, which resulted in a judicial arrangement under which the goods were sold and the bills were delivered up to S. cancelled, without the knowledge or consent of the plaintiff. The sale of the goods did not produce sufficient, even with the £2,500, to pay all the bills. In an action by the plaintiff against the defendants to recover back the £2,500:

*Held*, affirming the judgment of the Common Pleas Division, that the plaintiff was the principal in the transaction, and as the bills had been dishonored and there was a deficiency after realizing the goods, it was immaterial that S. had been discharged from liability upon the bills, and the defendants were not bound to refund the £2,500.

APPEAL from the judgment of the Common Pleas Division in favor of the defendants on a special case (\*).

*Petheram*, for the plaintiff, contended that the effect of the cancellation of the bills was to discharge both the plaintiff and Santayana from all liability on the bills, and to deprive the plaintiff, as the drawer, of all remedy upon them against Santayana, the acceptor, *Webb v. Hewitt* (\*); and as the plaintiff was only a surety and Santayana the principal debtor, the plaintiff was entitled to recover back the £2,500.

*Cohen*, Q.C., and *Edwyn Jones*, for the defendants, contended that the plaintiff was the principal in the transaction; that as the bills had been dishonored, and after the 331] goods had been realized \*there was a deficiency, the defendants were entitled to retain the £2,500: *Peacock v. Pursell* (\*).

BRAMWELL, L.J.: I think that the judgment of the Common Pleas Division is right and ought, to be affirmed.

(\*) *Ante*, p. 46. (\*) 3 K. & J., 438. (\*) 14 C. B. (N.S.), 728; 32 L. J. (C.P.), 266.

The plaintiff, in acknowledging the defendant's letter of the 25th of November, writes: "In the event of non-payment of such drafts, we authorize you to realize the goods represented by the documents attached, and hold ourselves responsible for any deficiency that may arise." Under that arrangement, if the goods were sold and there was a deficiency, the plaintiff bound himself to make good the amount of the deficiency: but the defendants were to have no right to sell unless the bills were dishonored. I think whatever words are used in the second letter the meaning is the same. They write: "We beg to hand you herewith a check for £2,500, which please encash and hold the amount as collateral security for the above six bills on Mr. Santayana, but when they are paid with charges, you will of course refund us the £2,500." I think the meaning of this letter is, whereas we have undertaken to be responsible for any deficiency we pay down £2,500 for the purpose of meeting that deficiency. Suppose the bills were never paid, but the goods realized more than the bills; it is clear that the whole £2,500 must have been returned to the plaintiff.

The way in which it has been put on behalf of the defendants, is this: the primary debtor is the plaintiff; but it is said for the plaintiff, as Santayana accepted the bill of exchange he became the primary debtor and the plaintiff the surety: but the latter is not the true view of the case. When Santayana accepted the bill no cause of action could arise against him until the bill was dishonored, and then it would; and no claim would arise against the plaintiff until there was a deficiency in the sale of the goods. But when Santayana dishonored the bill, this state of things came into existence, viz., that the plaintiff was liable for any deficiency that might arise, he having, on account of the advance made by the defendants, given them the £2,500. Why, by discharging Santayana on the bill, do the defendants lose their right \*against the plaintiff? They may lose their right [332 against the plaintiff on the bill, but they do not lose the right to go against the plaintiff for any deficiency, or become liable to return the £2,500 which has been given by the plaintiff, there being a deficiency upon the sale of the goods greater than the sum for which the plaintiff held himself responsible. It is manifest, if we look at the documents, the intention was that the plaintiff should do his best to lessen the loss that might arise from Santayana's default in dishonoring the bills.

There is no doubt that the arrangement made was the most advantageous that could be made: a *bona fide* compromise

1878

Meyerhoff v. Froehlich.

was effected. It is not suggested that it operated to the prejudice of the plaintiff. The plaintiff had assented to the arrangement made by Santayana. What is there to get rid of the obligation to make good the deficiency? I can see nothing. Mr. Petheram's argument is this,—the £2,500 is to be taken as security for payment of the bills; if the bills are paid they must have returned it; if the defendants were to return it when the bills were paid, it follows it must be returned if they release the acceptor of the bills. The case, he contended, is the same as if the plaintiff had given a bond for the payment of the bills, and Mr. Petheram argued that, as soon as the position of the principal debtor is altered, the surety is released; therefore the £2,500 ought to be returned. Upon a proper interpretation of these documents, this is not the position of the parties. The agreement between the defendants and Santayana was assented to by the plaintiff, and the plaintiff must be taken to have agreed to that being done which the law of the country required should be done; therefore, he being a primary debtor is liable for the sum which he agreed to make good.

BRETT and COTTON, L.JJ., concurred.

*Judgment affirmed.*

Solicitors for plaintiff: *Nicol, Son & Jones.*

Solicitors for defendants: *Mackrell & Co.*

See *ante*, p. 46.

[3 Common Pleas Division, 333.]

Feb. 15<sup>th</sup> 1878.

### 333] \*MEYERHOFF and Another v. FROEHLICH.

*Statute of Limitations—Promise to revive a debt under 9 Geo. 4, c. 14, s. 1—Conditional Promise.*

In May, 1874, the defendant, in answer to a demand of a debt incurred by him in 1865, wrote to the plaintiffs as follows,—“Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments.” It was admitted that in one year since 1874 the defendant's income had been £14 more than it was and since had been:

*Held*, that, assuming the letter to amount to such an acknowledgment as to warrant the inference of a promise to pay, it was a conditional promise only, and there was no affirmative proof of the substantial fulfilment of the condition.

STATEMENT OF CLAIM. 1. The plaintiffs are merchants at Aix-la-Chapelle, in Germany, and the defendant lives in Manchester.

2. Previously to the year 1865, the plaintiffs had lent the



defendant divers large sums of money, and on the 30th of June, 1865, there was a balance including interest due from the defendant to the plaintiffs of 7,218 German thalers 23 silbergroschen.

3. The defendant admitted the amount to be correct, and promised to pay it.

4. Since the 30th of June, 1865, the defendant has paid to the plaintiffs 1,510 thalers 7 silbergroschen on account of the said debt and interest, the last payment having been made on the 13th of January, 1870.

5. The following correspondence has passed between the plaintiffs and the defendant :

*Aachen, May 23d, 1874.*

Mr. R. Froehlich, Manchester,—

We are now such a long time without hearing from you and without the promised instalment that we are compelled to summon you to begin as quick as possible with your payments, as we should otherwise be obliged to cause you unpleasant consequences.

Meyerhoff & Jos. Salomon.

*Manchester, 29th May, 1874.*

My dear Mr. Salomon,—

Your letter arrived during my absence from Manchester. I am not surprised at your being vexed that I did not yet continue my instalments and so prove you my goodwill. But, what can I do if I don't possess the necessary means to do so ; and that is really the case. You will find it inconceivable, but it is \*nevertheless true. I am [334 nothing more than properly said a single paid clerk, in a responsible and important position its true, but badly paid ; and, even after several years staying at H. & W.'s, there is not to be reckoned upon any important amelioration. And, why then do I not give up such a situation ? Because I could not yet find another suitable one. As to salary I am not better remunerated to-day than I was three, four years ago ; and, if I could then send you something, it was simply because I was travelling nearly the whole year on the firm's expenses, while now it is just the reverse, for I am nearly the whole year at home spending on the most economic manner my wages, the small amount of which I am ashamed to name. It is true, since a few years I have a right to a small tantreime, i.e., in theory, but not in reality, because of the net profit which I partake in a small degree being absorbed by losses which I deserved neither in a direct or indirect manner, but which nevertheless count to my prejudice.

After more or less time it will I hope and trust change, because the position I am in presently does not allow me even to give anything to my family. Fortunately, through their working successfully, their maintenance does not depend upon me. Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments.

Robert Froehlich.

*Aachen, July 4th, 1876.*

Mr. Robert Froehlich, Manchester,—

Not having yet made any arrangements for the instalments of what you owe us, and what you call yourself a debt of honor, we again request you to begin with them immediately. We should much regret if you would cause to yourself some unpleasantness.

Meyerhoff & Jos. Salomon.

*Aachen, July 19th, 1876.*

Mr. Robert Froehlich, Manchester,—

Without your reply to our letter of the 4th instant, we request you by the present to begin without delay with the payments on account, in order that we shall not be compelled to cause you some unpleasantness.

Meyerhoff & Jos. Salomon.

*Manchester, July 28th, 1876.*

Messrs. Meyerhoff & Jos. Salomon, Aix-la-Chapelle,—

Your favor of the 19th was handed me over at my returning here. You refer to your favor of the 4th, which if sent me after has missed reaching me. On the evening of the 24th of March last at Aachen I exposed to your Mr. Meyerhoff my position, which since little bettered.

R. Froehlich..

*Aachen, July 31st, 1876.*

Mr. R. Froehlich, Manchester,—

Yours of the 28th instant is to hand. We cannot be satisfied with the short explanation you give us therein. At you last being here you told our Mr. Meyerhoff that you hoped soon being able to begin with the payments. We request you most urgently to make true that utterance, being otherwise compelled to cause you inconvenience.

Meyerhoff & Jos. Salomon.

335]

*\*Aachen, August 8th, 1876.*

Mr. Robert Froehlich, Manchester,—

We are still without your reply to our letter of the 31st

last month. We declare you herewith that we shall let us no more any longer divert, and request you to tell us whether you think or not to settle the affair in question, in order that we may take steps in consequence.

Meyerhoff & Jos. Salomon.

*Aachen, September 9th, 1876.*

Mr. R. Froehlich, Manchester,—

As you did not reply to our sundry letters, we beg to inform you that, if you should not prefer an amicable arrangement with us, we shall send your firm your letter of August 11th, 1855, with the acknowledgment of the debt and the assurance given to us therein that, in consideration of our indulgence, you would answer our claims, and that we shall ask for its interference.

Meyerhoff & Jos. Salomon.

*Manchester, September 15th, 1876.*

Messrs. Meyerhoff & Jos. Salomon, Aachen,—

I beg to acknowledge the receipt of your favor of the 9th instant, which I omitted doing respecting your anterior letters because my answers would necessarily have only been a repetition of my former statements, which are founded upon facts, and which would have been as unsatisfactory for me to make as for you to receive. My considerations for you are unchanged; and, if I cannot prove them practically, the reason of it is that I spent seven, eight valuable years with vain hopes and promises. Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living.

With full of esteem, I subscribe myself

Robert Froehlich.

6. The plaintiffs rely on the said correspondence to take the case out of the Statute of Limitations.

7. The plaintiffs will also, if necessary, contend that, if the promises in the defendant's letters are conditional, the conditions have been fulfilled.

The plaintiffs claim on a balance of principal and interest the amount of English money equivalent to 9,897 thalers 18½ silbergroschen, no part of which has been paid by the defendant.

Statement of defence. 1. In the year 1864, the defendant was carrying on business in America as a merchant and shipper and exporter of produce, and whilst so carrying on business it was agreed between him and the plaintiffs that

1878

Meyerhoff v. Froehlich.

purchases of produce and oil should be made by the defendant in America on the joint account and risk of the plaintiffs and defendant.

2. In pursuance of that agreement, and not otherwise, the 336] \*plaintiffs from time to time did previous to the year 1865 make remittances of money to the defendant for the purpose of purchasing as aforesaid on the joint account of himself and the plaintiffs, and that such remittances were duly applied by him for the purposes for which he received them.

3. The accounts relating to these joint purchases and of the outturn thereof have not been made up or rendered; and it is not the fact, as alleged, that, on the 30th of June, 1865, there was a balance (including interest) due from the defendant to the plaintiffs of 7,218 thalers 23 silbergroschen. Neither is it the fact that the defendant has admitted such sum to be due or the account to be correct; nor has the defendant promised to pay it.

4. The plaintiffs did not either previously to the year 1865 or at any other time lend the defendant divers large or any other sums of money; and the defendant says that he did not pay to the plaintiffs the sum of 1,510 thalers 7 silbergroschen on account of the sum of 7,218 thalers 23 silbergroschen, but that such payment was made by him in satisfaction and discharge of moneys advanced by the plaintiffs for the private and family expenses of the defendant, and that the plaintiffs received such moneys from the defendant for such purposes, and not for any other purpose; and the defendant says that he has repaid the plaintiffs for all moneys advanced or paid by them to or for his use.

5. The plaintiffs' claim in this action is barred by the Statute of Limitations.

6. The defendant does not admit the alleged correspondence referred to in the fifth paragraph of the statement of claim, and contends that the alleged correspondence does not take the plaintiffs' claim in this action out of the Statute of Limitations; and he says that no promises contained in the alleged correspondence have been fulfilled. Issue.

Upon motion for judgment before Denman, J., on the 15th of February, 1878, it was admitted that at the date of the letter of the 9th of May, 1874, the defendant was receiving at the rate of £200 per annum for commission; and that subsequently to 1874, he had received £214 in one year. It was also admitted that, on the 11th of August, 1867, there was due to the plaintiffs 7,218 thalers 23 silbergroschen, on 337] a current account at interest, and \*that payments

were made, and a balance was due as in the indorsement on the writ.

*C. Russell*, Q.C., and *Crompton*, for the plaintiffs: The acknowledgment to take a case out of the Statute of Limitations need not amount to a direct promise to pay: it is enough if a promise can be inferred from the letter: *Collis v. Stack* (<sup>1</sup>); *Lee v. Wilmot* (<sup>2</sup>); *Chasemore v. Turner* (<sup>3</sup>). In *Collis v. Stack* (<sup>1</sup>), Pollock, C.B., says: "The letter contains a distinct acknowledgment, with a promise to pay. No particular form of words is required to constitute a promise. 'All will be right' must be understood by everybody to mean 'you will be paid.'" The letter of the 29th of May, 1874, contains an absolute and unqualified admission that the debt is due,—at least as absolute as that in *Skeet v. Lindsay* (<sup>4</sup>). In giving judgment in that case, Cleasby, B., quotes the language of Mellish, L.J., in *Re River Steamer Co., Mitchell's Claim* (<sup>5</sup>): "There must be one of these three things to take the case out of the statute,—either there must be an acknowledgment of the debt from which a promise to pay is to be implied,—or, secondly, there must be an unconditional promise to pay the debt,—or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." Assuming this to be a conditional promise, to pay when the defendant's circumstances became "somewhat better," there was evidence by the admission that that condition was fulfilled.

*Hopwood*, Q.C., for the defendant: The letters relied on contain no such acknowledgment as to warrant the inference of a promise to pay the debt.

DENMAN, J.: Regard being had to the statement of claim, and the admissions agreed to at the trial, I think there can be no doubt that I ought to give judgment for the defendant. The passage in the letter of the 29th of May, 1874, which is mainly relied on, is as follows,—“Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments.” Now, *Chasemore v. Turner* (<sup>6</sup>) \*is a distinct [338 authority to show that a mere reference to “obligations” will not do; but that there must be such an acknowledgment of a debt as that a promise, absolute or conditional, to pay may be inferred. Even assuming that there is anything in the language of that letter from which a promise to

(<sup>1</sup>) 1 H. & N., 605; 26 L. J. (Ex.), 138.

(<sup>2</sup>) Law Rep., 1 Ex., 384.

(<sup>3</sup>) Law Rep., 10 Q. B., 500; 14 Eng. Rep., 304.

(<sup>4</sup>) 2 Ex. D., 314; 20 Eng. Rep., 564.

(<sup>5</sup>) Law Rep., 6 Ch., at p. 828.

1878

Myerhoff v. Froehlich.

pay could be implied, it is clearly only a conditional one, "as soon as my position becomes somewhat better,"—as soon as a future uncertain event shall take place. Then, look at the facts proved and admitted, to see if there has been any affirmative proof that the condition has happened. It seems that during one year the defendant's position was bettered to the extent of £14. In one sense, no doubt, the man's position was bettered: but that is hardly evidence that would warrant a jury in finding that the defendant's position had been substantially bettered so as to satisfy the condition. After all, it is a vague and loose expression; and, looking at the rest of the correspondence between the parties, it can hardly be said that the defendant was in a better position at the time the action was brought than he was in when he wrote that letter. In his letter of the 15th of September, 1876, the defendant writes,—“Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living.” Upon the whole, I see nothing which ought to be left to a jury as affirmative evidence that the condition of the defendant had become so really and substantially bettered as to satisfy the condition upon which his liability to pay the debt was to revive. It is not necessary, however, to go so far. Being in the position of a jury, to draw inferences of fact, the inference I draw is that there is nothing in the facts which appeared before me from which I could affirmatively say that the defendant is in a better position than he was in on the 29th of May, 1874. I therefore give judgment for the defendant, with costs.

*Judgment for the defendant.*

Solicitors for plaintiffs: *Pritchard, Englefield & Co.*, for Edwin Storer, Manchester.

Solicitors for defendant: *Chester & Co.*, for John Farrington, Manchester.

See 20 Eng. Rep., 568 note.

A debt is not destroyed by the running of the statute of limitations, but the right of action or remedy is lost.

When that is restored, the declaration is still on the original contract, and not upon the acknowledgment or new promise. Such acknowledgment is but a waiver of the statutory defence: *Wesner v. Stein & Grunawalt*, 97 Penn. St. Rep., 322.

The New York statute of limitations,

when applicable, is something more than presumptive evidence of payment. It is a complete bar to the recovery of the debt, and no admission of the debtor will avoid the discharge, unless under circumstances that indicate an acknowledgment of the debt, and a willingness to pay the same: *Fiske v. Hibbard*, 45 N. Y. Superior Ct. R., 331.

The failure of a guardian to sue upon a claim due his ward, until his right of action as guardian is barred

by the statute of limitations, does not prejudice the right of the ward, against whom the statute does not operate, until he is relieved of his disability: *Eckford v. Evans*, 56 Miss., 18.

A promise to pay, to take a debt out of the statute, ought to be made under circumstances which indicate an actual intention to pay: *McKinney v. Snyder*, 78 Penn. St. R., 497; *Riggs v. Roberts*, 85 N. C., 152.

Certain drafts drawn by defendant and indorsed by one B., having been protested, plaintiff, the holder of the drafts, in consideration of a conveyance of certain land to it by B., released him from all liability, and agreed to pay him one half of the amount which should thereafter be collected from defendant. Thereafter defendant conveyed certain lands to B.'s son in satisfaction of B.'s claim against him:

Held, that this latter transaction was not a payment on the original claim, from which a promise to pay the residue could be implied: *First National, etc., v. Smith*, 13 N. Y. Weekly Dig., 574.

An unaccepted offer to convey land in discharge of a debt, is not such an acknowledgment as will take the case out of the statute of limitations: *Riggs v. Roberts*, 14 Chic. Leg. News, 222, 85 N. C., 152.

An acknowledgment of a debt, to take it out of the statute of limitations, must be made to the creditor or his agent: *McKinney v. Snyder*, 78 Penn. St. R., 497.

An acknowledgment of a debt made to the agent of the creditor, without the knowledge of the debtor that he was such agent, has no more force than if made to a stranger: *McKinney v. Snyder*, 78 Penn. St. R., 497.

Where an acknowledgment or admission is relied on, to avoid the bar of the statute of limitations, in the absence of an express promise to pay the debt, it must amount to a clear and unambiguous recognition of an existing debt, so distinct and expressive as to preclude hesitation as to the debtor's meaning, and as to the particular debt to which it applies. It must, moreover, be consistent with a promise to pay: *Wesner v. Stein & Grunawalt*, 97 Penn. St. R., 322.

Where a cause of action is barred by the statute of limitations, unless an express promise is made by the debtor to pay, an acknowledgment by him sufficient to remove the bar under sec. 395 of the Code of Civil Proc., must be such that the law will imply a promise to pay the debt: *Stoker v. Walters*, 12 N. Y. Weekly Dig., 321.

An express promise to pay is not, however, necessary, when the same can be implied from the acknowledgment of a present indebtedness: *Fiske v. Hibbard*, 45 N. Y. Superior Ct. R., 381; *Kincaid v. Archibald*, 10 Hun, 9, 78 N. Y., 189.

See *Riggs v. Roberts*, 85 N. C., 152.

Part payment of a debt is a sufficient acknowledgment of its existence, from which to infer a promise to pay. But such payment, in order to have such effect, must be made to the creditors or his known agent, by the debtor himself, or by some person authorized to act for him.

If such part payment be made, not by the direction of the debtor, but in his presence and hearing, without anything on his part indicating that he does not participate in it, this fact may be submitted to the jury as evidence of a promise on the part of the debtor to pay, so as to avoid the running of the statute.

The giving of instructions by the surety upon a note, against which, as to him, the statute of limitations has run, to obtain for him a judgment against the maker of the note, in order to render him secure in relation thereto, should be submitted to the jury as evidence of an acknowledgment or promise on his part to pay the debt to the holder of the note: *Wesner v. Stein & Grunawalt*, 97 Penn. St. R., 322.

The new promise, which will revive a debt extinguished by bankruptcy, must be distinct and specific; and a mere acknowledgment of the debt, though implying a promise to pay, is not sufficient: *Riggs v. Roberts*, 85 N. C., 152.

E., being indebted to H., wrote to her a letter containing the following language, which, it is claimed, was evidence of a new promise, or an acknowledgment of the debt, and took the claim out of the operation of the statute of limitations, which would

have barred it otherwise, to wit: "I wrote to Mr. M. about the 1st inst., to know how I should send the money, and have not heard from him. I am going to A. to-morrow, and will send fifty dollars, which is all I can possibly spare at present."

Held, that this is not a sufficient writing to affect the operation of the statute of limitations: *Eckford v. Evans*, 56 Miss., 18.

To avoid the bar imposed by the statute of limitations, and as an independent ground of recovery, the following letter from the defendant to the plaintiff, of date May 21st, 1868, was relied upon: "Gentlemen—In reply to your favor of the 22d instant, you will please to withdraw your draft of \$314.37 upon me, as I cannot pay for the present. As soon as I have the money I shall remit."

Held, that such letter was too indefinite, either to avoid the statutory bar as against the account, or to sustain an action: *Sedgwick v. Gerding*, 55 Geo., 264.

The provision of the code (old code, § 110; new code, § 395) requiring a written acknowledgment or promise, to take a case out of the statute of limitations, does not require that the time when the acknowledgment or promise was made should appear in the writing, or be evidenced by writing; if, therefore, a writing containing either of the prescribed requisites is without date, or if the date stated is erroneous, parol evidence may be given of the time when it was executed: *Kincaid v. Archibald*, 73 N. Y., 189, affirming 10 Hun, 9; *Stanford v. Andrews*, 12 Heisk., 664.

To remove the bar of the statute of limitations, plaintiff introduced a letter from defendant, in which defendant said, "in regard to settlement," that he was "ready any day after that week," and "willing to leave it out to be settled," but that he thought it would be better "to settle it themselves," if they could; and that he did not see where plaintiff got his statement of what had been put upon the farm; and asked when plaintiff would "look the business over." Held, that the letter was an admission of the existence of an unsettled account, and an expression of willingness to pay the

balance that might be found due, and that it took the plaintiff's claim out of the statute: *Bliss v. Allard*, 49 Verm., 350.

Where the debtor wrote to the creditor in regard to the debt, "I am well aware that I owe you for the money borrowed. As you have the figures, I wish you would, at your leisure, make out a statement of what you consider my indebtedness to you, and send it to me, resting assured that in all money matters I want to act honestly toward everybody." Held, that these statements were a sufficient acknowledgment of a present indebtedness, and from which a promise to pay might be implied: *Fiske v. Hibbard*, 45 N. Y. Superior Ct. R., 331.

A barred debt will be revived by an acknowledgment of, and provision for it, in a deed of trust: *Stanford v. Andrews*, 12 Heisk. (Tenn.), 664.

But see *Pole v. Simmons*, 49 Md., 14.

Where an executor, in preparing an inventory of the estate, included therein a promissory note given by him to the testator, which was then barred by statute; held, that this was a sufficient acknowledgment in writing, within section 110 of the old code (new code, § 395), to remove the bar of the statute of limitations: *Ross v. Ross*, 6 Hun, 80; *Morrow v. Morrow*, 12 id., 386; *Clark v. Van Amburgh*, 14 id., 557.

The running of the statute of limitations of two years and six months, is not prevented by the administrator taking the creditor to his attorney and directing the latter to pay the claim out of certain moneys due the estates, when collected; nor by writing on the back of the claim, "I request that no suit shall be brought on this note, and agree that the statute shall not run against it; I will pay it soon."

The specific mention of a claim, without disputing its validity, in the bill of an administrator to reach realty, may save the bar of the statute as against the administrator, and the adult heirs who make no issue by answer, or cross bill, but not against an infant defendant: *Woodfin v. Anderson*, 2 Tenn. Chy. R., 331.

It is essential to the admissibility of the promise or acknowledgment of one of several administrators, in a suit against all, to take the case out of the



statute of limitations: 1st. That the original debt be proved *abunde*; 2d. That the promise or acknowledgment occur before the debt be barred by the statute; and 3d. That the admission be made within three years before the commencement of the suit: *Pole v. Simmons, etc.*, 49 Md., 14.

Prior to the execution of the bond and mortgage to secure the indebtedness which formed the consideration for those instruments, the obligor, A., took out a policy of insurance upon his life. This was subsequently held as collateral for the bond and mortgage. The policy was forfeited by reason of failure to pay the premiums. The time of such failure did not appear. Plaintiff, in October, 1866, received from the insurer a sum of money by reason of the policy. Held, that this payment did not avail to save the right of action from the bar of the statute.

It seems, that the getting of the policy and the payment of the premiums might have had that effect had it appeared that they were acts of A. within twenty years, but the payment of money by another, as a result of a prior act, would not have that effect.

Also held, that the fact that plaintiff told A. of this payment and that he made no reply, did not make it a

payment by him: *Acker v. Acker*, 81 N. Y., 143.

The obstruction of the statute may be removed by an act of partial payment, proved to have been made at a time commencing from which the prescribed limitation would not have expired at the beginning of the action; but the burden is upon the plaintiff to show that the partial payment was made at such a time as to save the debt from the operation of the statute: *Riggs v. Roberts*, 85 N. C., 152.

When a new promise is relied on to take a debt out of the operation of the statute, of limitations, and the new promise is a conditional one, the plaintiff cannot recover unless he proves performance of the condition. Proof of promise only is not sufficient. A promise to settle a demand when I am able, is not sufficient to take a case out of the operation of the statute of limitations without proof of defendant's ability to pay: *Mattocks v. Chadwick*, 71 Maine, 818.

A debtor, whose debt was barred by the statute of limitations, said to his creditor with regard to it, "I will pay it as soon as possible." Held, to be a sufficient acknowledgment of the debt to take it out of the statute: *Norton v. Shepard*, 13 Reporter, 70, 48 Conn., 141.

[3 Common Pleas Division, 339.]

March 25, 1878.

**\*SAXBY V. EASTERBROOK AND HANNAFORD. [339]**

*Libel injurious to Plaintiff in his Trade—Injunction to restrain future Publication—Judicature Act, 1873, s. 25, subs. 8.*

The court has power to issue an injunction to restrain a defendant from publishing of the plaintiff, to the injury of his trade, matter which a jury have found to be libellous.

*Semble*, that this power may be exercised by the judge who tries the cause.

*Prudential Assurance Co. v. Knott* (10 Ch., 142; 11 Eng. R., 498,) and *Thorley's Cattle Food Co. v. Massam* (6 Ch., 582; 23 Eng. R., 182,) considered.

**STATEMENT OF CLAIM.** 1. The plaintiff, at the times of the committing by the defendants of the acts hereafter complained of, was and still is one of a firm of engineers and makers of railway point and signal locking apparatus carrying on that business at Kilburn, under the name of Saxby & Farmer.

1878

Saxby v. Easterbrook.

2. The defendants carried on and still carry on the business of railway point and signal apparatus makers.

3. Before the committing by the defendants of the said acts, the plaintiff had, on the 26th of March, 1867, presented to the Queen a petition showing that he was in possession of an invention therein mentioned, and which invention he believed to be of great public utility, and stating that he was the true and first inventor thereof, and that the same was not in use by any other person or persons to the best of his knowledge and belief; and by the said petition the plaintiff prayed that Her Majesty would be pleased to grant unto him her royal letters patent, &c., for making and vending the said invention for the term of fourteen years, &c.

4. The said petition was accompanied by a statutory declaration made by the plaintiff, stating that he was in possession of the said invention, which he believed would be of great public utility, that he was the true and first inventor, and that the same was not in use by any other person or persons to the best of his knowledge and belief.

5. Her Majesty the Queen had by her solicitor-general refused the application of the plaintiff, but without prejudice to his filing a subsequent application for Her Majesty's grant to him of her \*royal letters patent for that which was described in his provisional specification already filed in support of the matter of the petition.

6. The defendants on the 19th of July, 1876, falsely and maliciously printed and published a libel of and concerning the plaintiff, and of and concerning the said petition and the refusal to grant the application, containing the words and libellous matter following, that is to say, "Locking the catch-rod (meaning the invention referred to in the said petition), Easterbrook's grant dated 13th September, 1867 (meaning a grant by Her Majesty to Walter Easterbrook, one of the defendants, for letters patent of the sole privilege to make, use, exercise, and vend a certain invention for a period of fourteen years, pursuant to the statutes in that case made and provided). Saxby's application (meaning the plaintiff's said petition and application to Her Majesty) cancelled by the Crown on ground of piracy from Easterbrook (meaning that the plaintiff had dishonestly and improperly presented the said petition, well knowing that he was not the true and first inventor of the said invention, and that he had dishonestly and improperly pirated the same from an invention by W. Easterbrook). Locking before the lever is moved, Easterbrook's grant dated the 24th

September, 1867, Saxby's dated 24th December, 1867. Locking by the slotted link (rocker, &c.), Easterbrook's patents dated 15th February, 1868, and 27th May, 1872. Saxby's (meaning the plaintiff's) dated 23d January, 1874." "Recent judgments of Lord Chancellors Hatherley and Selborne supporting Messrs. Easterbrook's claim. The person who first procures the Great Seal to be affixed to his letters patent holds it against the world. The Crown could not grant a second patent, in derogation of one already granted, although the holder of such first patent might have been second in date of application. When a patent has actually been sealed, the Crown will not afterwards enter into the question whether or not some one else who had previously applied was a prior inventor, and would in no case give a subsequent grant for the same thing for which a patent had already been granted before. The principle of the decision plainly is, that what the Crown has actually granted cannot, if vested in the grantee, be taken away from him and given to somebody else."

The plaintiff claimed £1,000. He also claimed an injunction \*to be granted to restrain the defendants from [341 publishing libels against the plaintiff and repetitions of acts of the like nature and description as those above stated.

Defence. 1. The defendants, as to par. 6 of the claim, deny the publication therein alleged of the several matters therein stated, and the meaning thereof respectively therein alleged.

There were various other allegations of defence, which in the result became immaterial.

At the trial before Lord Coleridge, C.J., it appeared that the defendants carried on business in partnership as engineers and railway signal manufacturers, and that some rivalry existed between them and the plaintiff who carried on a similar business, and that the libels complained of in the 6th paragraph of the statement of claim were published by the defendant Hannaford. The defendant Easterbrook, who disclaimed all knowledge of the publication, was discharged.

The jury found that the publications in question were libellous, and a verdict was taken against Hannaford for 40s., with costs, and the learned judge ordered that a perpetual injunction should issue to restrain him from publishing libels of the nature complained of against the plaintiff. A doubt, however, having been suggested as to the power of the judge at *nisi prius* to order an injunction to issue,

1878

Saxby v. Easterbrook.

March 25. *Aston*, Q.C. (*Macrory* with him), pursuant to notice, moved, "that a writ of perpetual injunction do issue to restrain the defendant Hannaford from publishing libels against the plaintiff of those or the like nature complained of, either in his own name or in the name of his firm, with costs." It was laid down by Lord Cairns, C., in *Prudential Assurance Co. v. Knott*<sup>(1)</sup>, that the Court of Chancery has no jurisdiction to restrain the publication of a libel as such, even if it is injurious to property. But, in a subsequent case,—*Thorley's Cattle Food Co. v. Massam*<sup>(2)</sup>,—Malins, V.C., upon a motion for an injunction to restrain the issuing of an advertisement containing false representations calculated to injure the plaintiffs' trade, held that, 342] notwithstanding \*the decision in *Prudential Assurance Co. v. Knott*<sup>(1)</sup>, the court had since the Judicature Act, 1873, s. 25, subs. 8<sup>(3)</sup>, power to restrain the publication of such an advertisement.

[LINDLEY, J.: I am under the impression that the Master of the Rolls refused to follow that.]

The cases of *Dixon v. Holden*<sup>(4)</sup> and *Springhead Spinning Co. v. Riley*<sup>(5)</sup> fully support the view taken by Malins, V.C.

*Macrae Moir*, contra.

LORD COLERIDGE, C.J.: I am of opinion that Mr. Aston is entitled to the order which he prays. This is an action for a libel, in which the plaintiff claims damages and an injunction to restrain the defendants from publishing libels against the plaintiff and repetitions of acts of the like nature and description as those described in the statement of claim, to the injury of his business. An order to that effect was made by me at the trial. But, inasmuch as it seemed to be doubtful whether, upon the cases in equity, such an injunction could be granted for the purpose of restraining the publication of a libel, it has been judged right to make the application to the court. Such cases there are; and

<sup>(1)</sup> Law Rep., 10 Ch., 142; 11 Eng. R., 498.

<sup>(2)</sup> 6 Ch. D., 582; 23 Eng. R., 182.

<sup>(3)</sup> Subs. 8 provides that "a mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just, and, if an injunction is asked, either before or at or after the hearing of any

cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any color of title, and whether the estates claimed by both or either of the parties are legal or equitable."

<sup>(4)</sup> Law Rep., 7 Eq., 488.

<sup>(5)</sup> Law Rep., 6 Eq., 551.

they seem to me to have proceeded upon a perfectly good ground, but one which is distinguishable in principle from the case now before us. Libel or no libel, since Fox's Act, is of all questions peculiarly one for a jury; and I can well understand a court of equity declining to interfere to restrain the publication of that which has not been found by a jury to be libellous. Here, however, the jury have found the matter complained of to be libellous, \*and it is [343 connected with the property of the plaintiff and calculated to do material injury to it. It is that which is sought to be restrained; and upon principle it appears to me to be a proper thing to do. My Brother Lindley, who is more conversant with these matters than I am, informs me that all the cases where the courts of equity have refused to interfere were cases where the application was made before verdict. Here, the jury have found the publications to be libellous; and they are eminently calculated to injure the plaintiff's property in the patent rights which are assailed. I am unable to see any reason why the injunction prayed should not be granted: certainly the cases cited do not supply that reason. If the cases do not help us, they are not in the way: all but one of them seem to have been confined to interlocutory orders, and in that one it was sought to restrain the continuance of waste or trespass. As to subs. 8 of s. 25 of the Judicature Act, 1873, I must confess I do not appreciate its application to the matter.

LINDLEY, J.: I am of the same opinion. I am not aware of any case in equity which is precisely in point. The principle upon which the courts of equity have acted in declining to restrain the publication of matter alleged to be libellous, is, that the question of libel or no libel is pre-eminently for a jury. But, when a jury have *found* the matter complained of to be libellous and that it affects property, I see no principle by which the court ought to be precluded from saying that the repetition of the libel shall be restrained. The only reason I can suggest for not granting it clearly does not exist here: and I think it would be much to be regretted if we felt ourselves compelled to refuse the order. It is, however, hardly a case for costs.

*Order absolute.*

Solicitors for plaintiff: *Faithful & Co.*

Solicitor for defendant Hannaford: *R. T. Timmins.*

See Moak's Underhill on Torts, 110-112, 131, 134, 694; 11 Eng. Rep., 498, 502 note; 23 id., 91 note.

The court refused an injunction to restrain the defendants from continuing to publish statements that the

1878

Saxby v. Easterbrook.

skates, about to be introduced by the plaintiffs, were an infringement of the defendants' patent.

There is no jurisdiction to restrain a publication, whether libellous or not, merely because it may tend to injure property.

*Semble*, there is no jurisdiction to compel a party, at the instance of his opponent, to assert his legal rights: *Hammersmith Skate Rink Co. v. Dublin Skating Rink Co.*, Irish Rep., 10 Eq., 235.

To maintain an action for a libel, injurious to plaintiff's business, it must be shown, not only that defendant's publication was not justified in fact, but that it was with malice for a wilful purpose of inflicting injury: *Snow v. Judson*, 38 Barb., 210, distinguished.

Plaintiff's complaint alleged, in substance, that they were the owners of a valuable right, secured by letters patent, and were engaged in the manufacture of the patented article; that defendant had printed, published and circulated a circular or notice, claiming it to be the owner of various letters patent securing such right, and was exclusively authorized to make and sell such patented articles, and threatening prosecutions for infringements of its right, in consequence whereof plaintiffs were injured in their trade, etc. Defendant, in its answer, set up its letters patent, and alleged that plaintiffs' trade was an infringement upon its rights. The court below found the issuing of the circular; that it was injurious to plaintiffs' business; but that it was issued in good faith, with the sole purpose of advising the public of what they considered their rights; and that the action was one not within its jurisdiction. Held, distinguishing *Durrall v. Jewett* (2 Paige, 134), and *Middlebrook v. Broadbent* (47 N. Y., 443), no error: *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y., 119.

A court of equity has the power to

enjoin the publication and circulation of a libel. This principle is applicable to equitable rights arising under the patent laws of the United States, where the legality of the patent is not the subject of injury, but is only collateral to the relief sought. Under the facts of this case, the discretion of the chancellor in refusing the injunction was not abused: *Bell v. Singer, etc.*, 65 Geo., 452.

A court of equity may, by injunction, restrain the publication of untrue representations calculated to injure the business of the plaintiff: *Thorley's Cattle Food Co. v. Massam*, 14 Chy. Div., 763, 11 Cent. L. J., 245, Court Appeal.

A complaint, in an action by a merchant for slander, in saying that he adulterated sugar, cheated the government, and swore he did not do so, is not sufficient, without allegations of circumstances from which the fair inference can be drawn, that the words used were spoken and introduced in such a way as presumptively to work an injury. Without such allegations, an innuendo cannot suffice.

It is not sufficient for plaintiff to allege that he was, as a member of a business firm, engaged in the business of refining sugar; for, to make the innuendo available, it must appear with sufficient certainty that the words were spoken of the plaintiff in his business relation as a sugar refiner.

Conceding that one partner may maintain an action for slander of himself in respect of the partnership business, yet, if the words are actionable only by reason of their influence in his calling, the injury to his interest must be specially averred. It is not enough to show an injury to his firm. As the addition of foreign substances may be proper in refining sugar, an allegation of a mere charge of adulteration is not sufficient to sustain an action: *Havermeyer v. Fuller*, 10 Abb. N. C., 9.

[3 Common Pleas Division, 344.]

June 26, 1878.

\*JONES V. ROBINSON.

[344

*Will—Bequest of "Personal Estate, Property, Chattels and Effects"—"Seised"—Construction—Intestacy as to Real Estate.*

A will by which the testator said, "I give and bequeath unto my wife my household goods" (and personalty of various kinds particularly specified), continued, "and all other my personal estate *property* chattels and effects whatsoever and wheresoever to which I am now *seised* possessed or entitled to or may hereafter acquire and can hereby dispose of to hold the same unto my said wife, her executors, administrators and assigns for her and their own use and benefit absolutely." Then followed a formal "devise" of real estate vested in him by way of mortgage in fee, and also of his trust estates to his wife and brother their "heirs and assigns" upon the trusts affecting the same estates respectively:

*Held*, that the word "personal" controlled the subsequent general words of the gift to the wife, and that real estates of which the testator died *seised* as absolute owner did not pass by the will.

SPECIAL CASE. John Jones duly made and executed his last will, dated the 28th day of September, 1849, and such will was (so far as is material for the present case) in the words following, that is to say: "I appoint my wife Mary Jones and my brother Thomas Jones of Blackthorn in the county of Oxford farmer executrix and executor of this my last will and testament. I direct that all just debts funeral expenses and the charges of proving this my will may be fully paid and satisfied and after payment and satisfaction thereof I give and bequeath unto my wife Mary Jones all my household goods and furniture and implements of household farming stock cattle growing crops and other effects in and about the house and upon the farm and lands in my occupation at Stratton Audley aforesaid and also all my ready money and money out at interest and securities for money mortgages bonds bills book debts and all other my personal estate property chattels and effects whatsoever and wheresoever to which I am now *seised* possessed or entitled to or may hereafter acquire and can hereby dispose of to hold the same unto my said wife Mary Jones her executors administrators and assigns for her and their own use and benefit absolutely and I do hereby devise all such \*real [345 estates as are now vested in me by way of mortgage in fee unto and to the use of the said Mary Jones and Thomas Jones their heirs and assigns subject to such equity of redemption as may affect the same estates respectively at the time of my decease but the money secured on such mortgages shall be considered as part of my personal estate. I also devise to the said Mary Jones and Thomas Jones all such

1878

Jones v Robinson.

estates as are now vested in me upon any trust or trusts to hold the same estates unto and to the use of the said Mary Jones and Thomas Jones their heirs and assigns upon the trusts affecting the same estates respectively."

The testator was at the time of his death seised for an estate of inheritance to him and his heirs, according to the custom of the manor of the prebend of Buckingham and Gawcott, in the county of Buckingham, of certain hereditaments therein situate.

He died on the 9th day of May, 1866, without having revoked or altered his will, which was duly proved by the said Mary Jones and Thomas Jones.

Upon the death of the testator his widow, Mary Jones, entered into possession of the said hereditaments, and continued in uninterrupted possession thereof up to the time of her death.

She died on the 24th day of December, 1871, having by her will, dated the 23d day of February, 1867, devised all her real estate unto trustees upon trust for sale.

Subject only to the question hereby submitted for the opinion of the court, the defendant was a *bona fide* purchaser from the trustees of the will of Mary Jones of the said hereditaments for valuable consideration.

The defendant, as such purchaser as aforesaid, entered into possession of the said hereditaments on the 25th day of March, 1872, and had ever since continued in uninterrupted possession thereof.

The heir of the testator, John Jones, according to the custom of the said manor, was his nephew John Jones, junior, who died on the 21st day of November, 1868, intestate, leaving his eldest son, the plaintiff, his heir according to the custom of the said manor.

346] \*The question submitted for the opinion of the court was, Whether, according to the true construction of the said will of the said testator, the said hereditaments were thereby effectually devised to the said Mary Jones, or whether he (the said testator) died intestate in respect thereof?

May 9. *Fawcett*, for the plaintiff: Freeholds may, no doubt, pass under the word "property" in a will. But here that word is inserted amongst others, showing it to mean personal property only.

THE COURT called on

*Pauli*, for the defendant: The adjective personal is attached to the noun "estate" only, and does not apply to "property." All other property "whatsoever" of which



the testator was "seised" is expressly given. "Property" will include real estate, and "seised" is a word applicable solely to real estate. Suppose the word "manors" followed "personal property," it certainly could not have been governed by "personal," and manors would have passed under the will. Then why, because the word property has a general signification, including personal as well as real estate, should it be restricted to personal estate and the word "seised" be disregarded? Many cases are cited in 1 Jarman on Wills, 3d ed., "which seem," says the author, at p. 683, "fully to sustain the position that to warrant confining of the word 'estate,' and other such expressions to personal estate, there must be a clear indication of an intention in the will so to confine them; for where this indication has been wanting, or has been less clear" than in some authorities previously mentioned, "the words have been held to be used in their proper, i.e., their unrestricted sense;" and at p. 693 the cases are said "to demonstrate the inclination of the courts at the present day to hold lands to pass under words *per se* capable of comprehending them, notwithstanding their association with terms applicable to personalty only." In *Evans v. Jones* (\*) a bequest which certainly seemed limited to personal estate was held to pass realty.

The onus of showing that real estate does not pass under \*general words in a will is now shifted on to those [347] who assert an intestacy.

[He referred also to *Hughes v. Pritchard* (\*); *Belaney v. Belaney* (\*).]

*Farocett*, replied.

*Cur. adv. vult.*

June 26. The judgment of the Court (Lopes and Denman, JJ.) was delivered by

LOPES, J.: The facts are clearly and concisely stated in the special case, and the material part of the will is as follows.

[His Lordship read it from the special.]

The only question is whether the real estate of the testator passed under these words to his widow, so as to be vested in the defendant, a *bona fide* purchaser from her, or whether it has passed to the plaintiff, the eldest son of the heir-at-law of the testator, as upon an intestacy. The testator

(\*) 46 L. J. (Ex.), 280.

(\*) 6 Ch. D., 24; 22 Eng. R., 622.

(\*) Law Rep., 2 Ch., 138.

having carefully enumerated many kinds of personal property proceeds thus: "and all other my personal estate property chattels and effects whatsoever and wheresoever to which I am now seised possessed or entitled to or may hereafter acquire or can hereby dispose of to hold the same unto my said wife Mary Jones her executors administrators and assigns for her and their own use and benefit absolutely." Most of the expressions used are applicable, it is to be observed, exclusively to personalty, indeed the only word technically applicable to realty is "seised."

In determining the construction to be put upon a will every reasonable intendment should be made against an intestacy. It is, however, a canon of construction that the words are to be taken to be used in their proper meaning unless something is found in the will to show the testator intended to use them in a different sense. Wills are not frequently expressed in the same language, and it is, therefore, difficult to find any authority precisely in point. The case of *Belaney v. Belaney* <sup>(1)</sup> is very similar, and the judgment of Lord Chelmsford seems to cover this case. The words of the will in that case, so far as material, were as follows: "I hereby give and bequeath to my said wife the whole of my personal property, estate, and effects of every 348] and whatsoever kind they may \*be, for her sole use and benefit." It was held that these words were not sufficient to pass the real estate, and Lord Chelmsford said, "If the words of this will are read according to their ordinary sense and construction the word personal overrides all the subsequent words, property, estate, and effects. It has been urged that the will is to be read as if there was a comma after the word property, and that the effect of the word personal is exhausted upon the word property, and extends no farther. I am, however, bound to ascertain the meaning of the testator from his words, and I cannot doubt that 'personal' extends to these subsequent words as well as to property. The cases cited for the appellant were only cases where the word estate was held not to be qualified by being associated with words relating only to personalty, and have no bearing upon a case where the word estate is overridden by the word personal. I might guess that it was the testator's intention that all his interest in this property should go in the same direction, but that would be mere conjecture, and I should have to strike out the word personal in order to give the will such a construction." Adopting the reasoning in

(1) Law Rep., 2 Ch., 138.

the above case we think in this case that the word personal overrides the word "estate," and extends to the subsequent words "property," "chattels," and "effects," and that the mere introduction of the word "seised," in the passage "to which I am now seised, possessed, or entitled to," is not sufficient reason for holding otherwise. The case of *Evans v. Jones* (1) is distinguishable from the case now before us. The words there were "first, I give and bequeath to my said wife all my household furniture, linen, glass, china, plate, farming stock, and all my personal estate and effects whatsoever and wheresoever and of what nature and kind soever, or whatever I may be possessed of at my decease, to and for her sole use and benefit." It was held in that case that the latter words need not be read as part of one clause containing general words following a particular enumeration, but that they might be read as introducing a new subject by the word "or." On this ground it was held that the real property passed. There are no such comprehensive words here, and there is nothing to disconnect the subsequent general words from the governing word "personal," which precedes them.

\*A case of *Smyth v. Smyth* has been recently be- [349 fore Vice-Chancellor Malins, and is reported in the Weekly Notes of June the 22d last, where it was held that real estate passed under the words "All the rest, residue, and all other his effects" in the following gift in a will, "And lastly, I give my sheep, and all the rest, residue, moneys, chattels, and all other my effects to be equally divided among my four brothers, whom I hereby constitute and appoint to be sole executors of this my last will and testament" (2). It is to be observed that there is no general and qualifying word like "personal," and the case is distinguishable from the present on this ground. In the present case it is to be observed that the testator appears to have understood the distinction between real and personal estate, and the distinction between the appropriate words for disposing of them respectively. At a later part of the will, when he proceeds to deal with the estates vested in him by way of mortgage in fee, he uses apt language, and while he devises them to Mary Jones and Thomas Jones, their heirs and assigns, he directs that the money secured is to form part of his personal estate. The testator also uses apt and appropriate language when he disposes of his trust estates.

We think the words relied upon are insufficient to pass

(1) 46 L. J. (Ex.), 280.

(2) Since reported, 8 Ch. D., 561; 25 Eng. R., 477.

real estate, and that the plaintiff is entitled to judgment with costs.

*Judgment for the plaintiff.*

Solicitors for plaintiff: *Lovell, Son & Pitfield.*

Solicitors for defendant: *Risley & Stoker.*

[3 Common Pleas Division, 350.]

June 26, 1878.

[IN THE COURT OF APPEAL.]

[350] \*KIPLING, Public Officer of THE DARLINGTON JOINT STOCK BANKING COMPANY V. TODD.

THE SAME V. ALLAN.

*Company—Scire facias—Companies Clauses Consolidation Act, 1845 (18 Vict. c. 16), s. 36—Director named in Special Act—Resignation of Directorship—Implied Surrender of Inchoate Right to take Shares and Implied Acceptance of such Surrender.*

A railway company was incorporated by a special act passed in June, 1866, in which T. and A. were nominated directors, until the first ordinary meeting of the company, and which provided also that the qualification of a director should be the possession of fifty shares. In August, 1866, T. sent in his resignation as director, and S. was informally appointed director in his stead, and thenceforward continued to act as such. T. took no part in the affairs of the company, never applied for any shares, none were allotted to him, and although calls were made, no notice thereof was given to him. A. acted as director until December, 1867, when he also resigned his directorship; shortly afterwards B., who had not previously acted as a director, and whose name was not in the special act, attended the meetings of the board as director. No shares were ever allotted to A. No first ordinary meeting of the company was ever held. After the resignations of T. and A. an informal register of shareholders was drawn up, from which it appeared that the whole number of shares constituting the capital of the company had been allotted to other persons than T. and A. After the resignations of T. and A. the railway company became indebted to the D. Banking Company. In February, 1876, the plaintiff as public officer obtained judgment against the railway company for £18,000, and in November issued execution against them; the execution being unsatisfied, he issued, in July, 1877, writs of scire facias upon the judgment against T. and A. as holders severally of fifty shares in the railway company:

*Held*, that the writs of scire facias could not be maintained against T. and A., for it was to be inferred from the facts above stated that the railway company had accepted from T. and A. a surrender of the inchoate right to shares which they possessed under the special act; that the evidence of an acceptance of the surrender of an inchoate right need not be as express as would be required in the case of the surrender of specific shares actually allotted; and that the lapse of years, during which the railway company had not treated T. and A. as shareholders, was strong evidence that they had abandoned all rights against them; and that, the plaintiff's causes of action having accrued since their resignations, T. and A. were not estopped as against him from denying their liability as shareholders; and that he could not be in a better position as regarded them than the railway company.

*Porter v. Emmens* (1 C. P. D., 201, 664,) distinguished.

SCIRE FACIAS to recover against the defendants severally the sum of £500, founded upon a judgment obtained by the

plaintiff, as the public officer of the Darlington District Joint Stock Bank, for \*the sum of £18,322 8s. 3d. against [351] the Merrybent and Darlington Railway Company, wherein the defendants were alleged to be severally the holders of fifty shares. The writs of scire facias were dated the 12th of July, 1877.

The actions were tried in Middlesex during the Hilary Sittings, 1878, before Lopes, J., without a jury. It is necessary to mention only the following facts. The Darlington District Joint Stock Banking Company had, since the 1st of October, 1869, advanced sums of money to the Merrybent and Darlington Railway Company; these sums not having been repaid, the plaintiff, as one of the registered public officers of the banking company, had, on the 1st of February, 1876, obtained judgment against the railway, execution was issued thereon, but was not satisfied, and thereupon the writs of scire facias above mentioned were issued. Each of the defendants was nominated a director by the Merrybent and Darlington Railway Act, 1866<sup>(1)</sup>. The defendant Allan had been \*chairman of the company, and continued [352]

(<sup>1</sup>) The Merrybent and Darlington Railway Act, 1866 (29 Vict. c. lxxv), s. 2, received the royal assent on the 11th of June, 1866, and incorporated the Companies Clauses Consolidation Act, 1845.

Section 4: Certain persons, including the defendants and Henry Currer Briggs, and Henry King Spark, "and all other persons and corporations, who have already subscribed or shall hereafter subscribe to the undertaking, and their executors, administrators, successors, and assigns respectively, shall be united into a company for the purpose of making and maintaining the railway, and for other the purposes of this act; and for those purposes shall be incorporated by the name of the Merrybent and Darlington Railway Company, and by that name shall be a body corporate, with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose of lands and other property for the purposes of this act."

Section 13: "The first ordinary meeting of the company shall be held within three months after the passing of this act."

Section 14: "The number of directors shall be seven; but it shall be lawful for the company from time to time to reduce the number, provided that the number be not less than five."

Section 15: "The qualification of a director shall be the possession in his own right of not less than fifty shares."

Section 17: Seven persons, including the defendants and Henry Currer Briggs, "shall be the first directors of the company, and shall continue in office until the first ordinary meeting held after the passing of this act; at that meeting the shareholders present, in person or by proxy, may either continue in office the directors appointed by this act, or any of them, or may elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by this act being, if qualified, eligible for re-election; and at the first ordinary meeting to be held in every year, after the first ordinary meeting, the shareholders present, in person or by proxy, shall (subject to the power herebefore contained for reducing the number of directors) elect persons to supply the places of the directors then retiring from office, agreeably to the provisions in the Companies Clauses Consolidation Act, 1845, contained, and the several persons elected at any such meeting, being neither removed, nor disqualified, nor having resigned, shall continue to be directors until others are elected in their stead in manner provided by the same act."

to act as a director until December, 1867, when he resigned. No shares were ever allotted to him, and he had never purported to transfer any. The defendant Todd resigned in August, 1868, shortly after the act was passed, and never acted as director, nor were any shares allotted to him.

The other material facts, the course of the trials, and the arguments are sufficiently mentioned in the judgment of the court.

June 19, 20. *W. G. Harrison, Q.C., and English Harrison*, for the plaintiff.

*Benjamin, Q.C., and Candy*, for the defendant Todd.

*Herschell, Q.C., Lumley Smith, and Brook Little*, for the defendant Allan.

In addition to the authorities mentioned in the judgment the following cases were cited: As to the admissibility in evidence of the register of shareholders, *London and North Western Ry. Co. v. M<sup>r</sup> Michael*<sup>(1)</sup>; as to the admissibility in evidence of the company's minute book, *Sheffield and Manchester Ry. Co. v. Woodcock*<sup>(2)</sup>; as to the liability incurred by acting as director of a company, *Austin's Case*<sup>(3)</sup>; *Harward's Case*<sup>(4)</sup>; as to the liability incurred by being nominated a director in an act of Parliament constituting a company: *Kincaid's Case*<sup>(5)</sup>; *Forbes' Case*<sup>(6)</sup>.

*Cur. adv. vult.*

June 26. The judgment of the Court (Bramwell, Baggallay, and Thesiger, L.JJ.,) was delivered by

THESIGER, L.J.: The plaintiff in these actions is a judgment creditor of the Merrybent and Darlington Railway 353] Company for \*a sum exceeding £18,000, and seeks by means of the process of scire facias to obtain execution against each of the defendants to the amount of £500, as a holder of fifty shares in the company. The actions were tried before Lopes, J., without a jury, judgments were given by him for the plaintiff in each action, and against those judgments the present appeals are brought. The evidence upon which the learned judge acted consisted of statements made by counsel which were taken as admitted, the oral examination of the secretary of the company, a register of shareholders which was put in, subject to objections as to its admissibility and as to its validity; and a minute book, which was referred to in a general way, was handed to the learned judge for his perusal, and must, we think, be taken to have been made evidence, although it has been contended

<sup>(1)</sup> 5 Ex. 833; 20 L. J. (Ex.) 6.

<sup>(5)</sup> Law Rep., 13 Eq., 30.

<sup>(2)</sup> 7 M. & W., 574.

<sup>(6)</sup> Law Rep., 11 Eq., 192.

<sup>(3)</sup> Law Rep., 2 Eq., 433.

<sup>(4)</sup> Law Rep., 19 Eq., 333.

before us that only one or two minutes were actually referred to. In addition to the materials before the learned judge, we have had read to us, without objection on the part of the plaintiff, an affidavit sworn by the defendant Todd. It would have been more satisfactory to the court if the evidence in the two cases had been taken in a somewhat more formal and precise manner, for considerable time has been occupied in the argument in this court in deciding what was proved or admitted at the trial, there being a difference of opinion upon this point between the learned counsel engaged. The following facts, however, may be treated as established:

The royal assent was given to the Merrybent and Darlington Railway Act on the 11th of June, 1866. Prior to its passing, the defendant Todd, an owner of land in the neighborhood of the line of the proposed railway, was asked by a person of the name of Boyer to join him and other persons in the prosecution of the railway scheme, and to become a shareholder in, and a director of, the company to be incorporated. At that time it was intended that the qualification of a director should be the possession of 100 shares of £10 each. Todd at first assented to Boyer's request, and paid a deposit of 5s. a share, or £25 in respect of the qualification shares, which it was then contemplated he would receive when the act incorporating the company should pass. Subsequently, however, Todd appears to have come to the conclusion that as he was not himself a resident in the country in which the proposed \*railway was to be made, it [354] would be better for him to have nothing to do with it, and he accordingly wrote to that effect to Boyer. In answer to his letter Boyer wrote informing him that his name was already in the bill, which had been lodged in Parliament, and that it would be inconvenient at the stage of the proceedings in Parliament which had then been reached to strike it out, and suggesting that he should allow his name to remain, and should after the passing of the act resign his position in the company. Todd acquiesced in this suggestion, and the bill passed into law. By the 4th section nine persons, including the defendants Todd and Allan and a person of the name of Spark, were specifically named as constituting with all other persons who had already subscribed, or should thereafter subscribe to the undertaking, the company incorporated by the act; and by the 17th section seven of the persons named, including Todd and Allan, but excluding Spark, were constituted the first directors of

1878

Kipling v. Todd.

the company. The terms of that section are as follows: [The Lord Justice read it.]

The act having passed, Todd carried out the arrangement which he had made with Boyer, sent in his resignation as director, and on the 29th of August, 1866, a meeting of directors was held at which the board purported to accept the resignation and to appoint Spark director, in the stead of Todd, and on the same day an attempt was made to hold an ordinary meeting of the company, at which Spark would have been presumably elected by the company a director in accordance with the terms of s. 17 of the special act, but which, as appears from the minute book, was adjourned in consequence of a quorum of shareholders not being present. Spark, however, thenceforward acted as a director. Todd took no part whatever in the affairs of the company, never applied for any shares in it to be allotted to him; no shares were allotted to him, and although it appears from the minute book that upon four occasions resolutions for calls were made by the directors, there is no evidence that notice of such calls or any of them was given to Todd; and as far as relates to any act done either by him or the directors of the company, or the company itself, Todd entirely ceased to have any connection with the company, and, for anything that appears in the evidence, never heard anything more of 355] it until eleven years afterwards, \*when the plaintiff issued his writ of scire facias against him. The case of Allan differs in this respect, that he at the time when the special act passed, seems to have intended to take part in the affairs of the company, and did act as a director down to the month of December, 1867, when he also resigned his directorship. There is no entry in the minute book of any appointment of a director in his stead, but shortly after his ceasing to act, the name of A. Briggs, who had not previously acted as a director, and whose name is not in the special act, appears in the minute book as one of the directors attending the board. As regards the subsequent history of the company, the evidence before us is of the most meagre character. Prior to 1869 no register of shareholders existed, and no allotment of shares had been made; but in August, 1869, a register of shareholders was in fact sealed, and such register was put in at the trial, subject to the objection already referred to, as to its admissibility in evidence, and also to the objection that, even if admitted in evidence, it could have no legal effect, being sealed at a meeting of the company at which there was no proper quorum. Upon this latter point Richardson, the secretary of the company, who



was examined as a witness, proved that the only two persons present at the meeting in August, 1869, were Spark and a person of the name of Johnston, who was one of the directors of the company. Apart, however, from the evidence of the register, it was stated at the trial, on the part of Todd and Allan, and not disputed, that a mining and smelting company, called the Merrybent and Middleton Tyas Mining and Smelting Company, Limited, became the holders of 5,659 shares out of the 6,000 shares, which constituted the capital of the company, and Richardson proved that £54,000 had been paid by the mining company, although in what way this amount was paid did not appear, and that with this exception no payment in respect of shares was made by anybody.

In this state of facts it was contended, on the part of the plaintiff, that both Todd and Allan, by virtue of this nomination as directors in the special act of the company became shareholders of the company for the number of shares mentioned in the act as the qualification of directors, that their liability as shareholders could only be got rid of by transfer of those shares in the manner \*provided by [356 the Companies Clauses Consolidation Act, 1845, and that a transfer had not in fact in any manner been validly made, and that the writs of *scire facias* were properly issued against both the defendants. The defendants, on the other hand, while admitting that owing to their nomination as directors in the special act they became shareholders of the company upon the passing of that act, urged that the liability incurred was one different in kind to that which would have attached to them, if shares had been duly allotted to them, and contended that the resignations of their offices as directors took effect in law as well as in fact, and was acted on by the company, that the proper inference from the evidence was that the whole of the 6,000 shares which constituted the capital of the company were held by persons other than themselves, and that under all the circumstances of the case their liability as shareholders had ceased. In support of the plaintiff's contention great reliance was placed upon the case of *Portal v. Emmens* (<sup>1</sup>), which being a decision of this court, is binding upon us, and which was alleged by the plaintiff's counsel to be decisive upon the question before us. It becomes necessary, therefore, to ascertain in the first instance what that case really decided.

We cannot agree with the argument of Mr. Benjamin that the *ratio decidendi* was limited to the narrow ground of an

(<sup>1</sup>) 1 C. P. D., 201, 664.

estoppel founded upon the special circumstances of the case, although the judgment of the Lord Chief Justice Cockburn<sup>(1)</sup>, and the concluding passages of the judgment of the Master of the Rolls<sup>(2)</sup> lend some color to the argument; but we read the judgment as deciding that where, by an act of Parliament, persons' names are incorporated into a company having a share capital, and the same persons are also named as directors, while the holding of a certain number of shares is prescribed as a qualification for the office of directors, these legal consequences follow: First, Each corporator *ex necessitate rei* becomes a member of the company, and as such, and apart from the definition of shareholder given in s. 3 of the Companies Clauses Consolidation Act, 1845, must be considered as holding at least one share in the company; 357] and each person \*named as a director must be considered as holding at least the number of shares constituting the prescribed qualification: Secondly, Section 36 of the last mentioned act, under which the scire facias in this and similar cases is issued, authorizes its issue against any shareholder. Section 3 of the same act defines "shareholder" as meaning "shareholder, proprietor, or member of the company," and consequently execution may issue against a person who by the special act is constituted a director, a member of the company, and therefore a shareholder. The decision in *Portal v. Emmens*<sup>(3)</sup>, though going to the length we have mentioned appears to us to go no farther, and the facts there proved showed that the defendant on the one hand had done nothing for the purpose of getting rid of his position as director, with its consequent obligations, and on the other hand had done nothing towards satisfying the liability of the plaintiff, under which the company by its special act itself had come. It is a long step from such a case to the present, where years after directors have resigned their offices, and other persons *de facto* acted in their stead, without any claim being made by the company to treat the original directors as shareholders, a creditor of the company whose claim against it only first arose long after their resignations, attempts to treat those original directors as still shareholders; and we are of opinion that such a claim cannot under the circumstances of this case be supported. In forming this opinion we purpose to assume in favor of the plaintiff: 1, that no valid election of directors in the place of Todd and Allan ever took place for the reason that such elections were, by the provisions of the special act, to be made by the company and not by

(1) 1 C. P. D., at p. 664. (2) 1 C. P. D., at p. 668. (3) 1 C. P. D., 201, 664.

the board of directors, and no valid ordinary meeting of the company at which such election could be made, ever in fact took place; 2, that the register is not evidence against the plaintiff, although it might be evidence against the defendants, and would be evidence as between them and the company in actions for calls, see ss. 26, 27, and 28 of the Companies Clauses Consolidation Act, 1845; 3, that no register was ever duly authenticated by the company, there having been no meeting at which the company's seal was properly authorized to be affixed to it.

\*But, having assumed thus much in favor of the [358 plaintiff, how stands the matter? No shares were in fact allotted to the defendants, therefore no shares could be transferred by them in the manner prescribed by ss. 14 and 15 of the General Act. This was admitted on the part of the plaintiff, and it was argued on his part that until an allotment of shares, and possibly until the formation of a register, it would be impossible for the defendants to get rid of their positions as shareholders. But we cannot concur in this view. The decision in *Portal v. Emmens* (\*) requires us to imply that Todd and Allan were at one time shareholders, from the fact that they were named as corporators and directors in the special act; but the reason of the thing would seem to require that it should be competent to persons in such a position, by *bona fide* arrangement between them and the company, to relinquish their position as corporators and directors, and to get rid of its consequent liabilities, provided no circumstances existed which might constitute an estoppel in favor of a particular creditor; and if this be so, it would also seem to follow that the fact of such an arrangement may be established as against a creditor, who cannot set up an estoppel, in the same manner as it might be established between the same person and the company itself. Now, could we reasonably hold under the circumstances of this case and after such a lapse of years, that the company on the one hand could have claimed to treat either Todd or Allan as shareholders, or that Todd or Allan, if the company had been successful, could have enforced a claim to an allotment of the shares, which constituted the qualification for the position which they once held? As a matter of fact from the figures proved it has been not unreasonably argued that no shares could have been allotted to the defendants, for from the minutes of the meetings of the board of directors held after the resignation of Todd and Allan it appears that seven persons, that is to say, the

(\*) 1 C. P. D., 201, 664.

1878

Kipling v. Todd.

maximum number allowed by s. 14 of the special act, acted in the capacity of directors, and if each held the prescribed number of fifty shares, which upon the maxim "*omnia præsumentur rite esse acta*" it might be supposed they did, and no transfers of shares being proved to have taken 359] place, 350 shares would thereby \*be absorbed, and inasmuch as the mining company is proved to have held 5,650 shares, the whole capital of the company would thus be allotted to persons other than the defendants. But be this how it may, we think it at all events a proper inference from the facts proved that the company accepted from Todd and Allan a surrender of the shares or the inchoate right to shares, which the defendants possessed under the special act. Such a surrender might under s. 9 of the Companies Clauses Act, 1863, be accepted by a company on such terms as they think fit of any shares which have not been fully paid up. If a company may accept a surrender in the case of specific shares actually issued, it seems to follow that they may do so in the case of a mere right to have specific shares allotted, and that the evidence of an acceptance in the latter case need not be as express as would be required in the former case; for where shares have been issued and certificates given, it would be reasonable to expect that a surrender should be evidenced either by writing or by a delivery of the certificates to the company, but where there is nothing to deliver and only a right or liability to be enforced the mere non-enforcement of that right or liability for many years is in itself strong evidence of the right or liability having been abandoned.

It has been suggested that if under such circumstances as exist in the present case a director of a company named as such in the special act were held to have become freed from the liability attaching to his position, then the whole body of the directors could by mere arrangement among themselves equally free themselves from liability, and creditors of the company might be left without any shareholder against whom they could enforce execution. But we think that the courts are strong enough to stop any unjust and collusive arrangements of the kind suggested, and that they have no analogy in kind or degree with the *bona fide* surrender, which we infer from the facts before us. The authorities, which have been cited in argument do not directly support the conclusion at which we have arrived, but they are in no way adverse to it. *The Cheltenham and Great Western Union Ry. Co. v. Daniel* (1), and *Scott v. Berke-*

(1) 2 Q. B., 281.

Brocklebank v. Lynn Steamship Co.

1878

*ley* ('), at least indicate that the courts in cases like the present will look to the substance of the \*transactions [360 which are in question, and where persons, whose position as shareholders is a legal consequence of some other position held by them, relinquish that other position under circumstances which evidence an intention to cease to be a shareholder, acted upon by the company, will hold, that such intention has been effectually carried out, even though forms, prescribed by act of Parliament or adopted as the general mode of carrying out such transactions, have not been in the particular instance adhered to. The appeals must be allowed, and judgments entered for the defendants.

*Judgments reversed.*

Solicitors for plaintiff: *Clarkes, Rawlins & Clarke*, for Allison, Son & Willan, Darlington.

Solicitor for defendant Todd: *Adam Burn*, for Steavenson & Meek, Darlington.

Solicitor for defendant Allan: *R. T. Jarvis*, for Hutchinson & Lucas, Darlington.

(') 3 C. B., 925.

[3 Common Pleas Division, 360.]

June 28, 1878.

### WILKINSON V. CALVERT.

*Landlord and Tenant—Yearly Tenancy—Agreement for Six Months' Notice to quit—The Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51—Year's Notice.*

A yearly tenancy which by express agreement of the parties is determinable on six months' notice to quit is not within the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51, which provides that "Where a half year's notice, expiring with the year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this act be necessary and sufficient for the same."

[3 Common Pleas Division, 365.]

Feb. 28, 1878.

### \*BROCKLEBANK & CO. V. THE KING'S LYNN [365 STEAMSHIP COMPANY.

*Bankruptcy—Practice—Security for Costs—Filing Petition under the Bankruptcy Act.*

Security for costs, where the plaintiff has become bankrupt or has filed a petition for liquidation, is not necessarily confined to *future* costs, but may, when applied for promptly, be extended to costs already incurred in the suit.

*Ozenden v. Cropper* (4 Dowl., 574,) overruled.

**ACTION** for breach of a charterparty. After the cause had been set down for trial, the plaintiffs filed a petition for liquidation under s. 125 of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71. On the 29th of January, 1878, application 366] was made by summons \*calling upon the plaintiffs to give security for costs, and the master ordered that security should be given to the amount of £50, but in respect of *future* costs only. Upon appeal against this order, Field, J., varied it by making it extend to costs *already incurred*.

*H. Kisch*, moved by way of appeal: The order was not warranted so far as regards the costs already incurred. It is true that, in *Harvey v. Jacob* (\*) and *Mason v. Polhill* (\*), security was ordered to be given for retrospective as well as prospective costs; but, in a subsequent case, *Oxenden v. Cropper* (\*), Patteson, J., refused to compel the plaintiff to give security for costs already incurred. In *Republic of Costa Rica v. Erlanger* (\*), Lord Justice James says: "For the £1,000 *already* incurred, no security can be given within the meaning of this rule" (\*). In *Grant v. Banque Franco-Egyptienne* (\*), upon a motion for security for costs of appeal, made after the time fixed for the hearing, Lord Justice James said: "It is too late to make the application, so far as regards any costs already incurred, after the time has been actually fixed for the hearing of the appeal."

*Anstie*, contra: *Harvey v. Jacob* (\*) was a decision of the full court, and neither that case nor *Mason v. Polhill* (\*) was cited in the case before Patteson, J. The learned judge thought more weight should be attributed to the former than to the latter case. That the plaintiff was a criminal was hardly a circumstance which could be relied on as a distinction. The reason of the rule allowing security for costs where the plaintiff files a petition for liquidation is given by Blackburn, J., in *Malcolm v. Hodgkinson* (\*).

[LINDLEY, J.: The form of the order for security in Section on Decrees, 3d ed., 1269, makes no distinction between future costs and costs already incurred.]

367] \*DENMAN, J.: *Harvey v. Jacob* (\*) is an express authority upon the point. I see no distinction in principle between that case and the present. The case of *Republic*

(1) 1 B. & A., 159.

(2) 2 Dowl., 61.

(3) 4 Dowl., 574.

(4) 3 Ch. D., 62, 69.

(5) "In any cause or matter in which security for costs is required, the security

shall be of such amount and be given at such time or times and in such manner and form as the court or a judge shall direct." And see No. 7 of the Rules of Feb., 1876.

(6) 1 C. P. D., 143.

(7) Law Rep., 8 Q. B., 209.

of *Costa Rica v. Erlanger* (') differs in this, that all the circumstances were known to the defendant from the very commencement of the suit; and when *Oxenden v. Cropper* (') was before Patteson, J., the previous cases were not cited. I think my Brother Field was quite right in acting upon the decision of the Court of Queen's Bench.

LINDLEY, J.: I am of the same opinion. The only case in favor of this appeal is *Oxenden v. Cropper* ('). That, however, is opposed to a former case (not cited) where the question was apparently fully gone into, and before the full court. I think, therefore, the earlier decision ought to prevail. The matter was not argued in *Erlanger's Case* ('), and there was a delay of two years there: nor do I think that Order LV has any application to the matter. The rule, as stated in Daniell's Chancery Practice, 32, 33, 5th ed., shows that the common form of order is applicable to security for the whole costs, and is not limited to after-accruing costs. The practice seems to me to be well settled, and the appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitors for plaintiffs: *Kisch, Son & Hanbury*.

Solicitors for defendants: *Flux & Leadbitter*.

(') 3 Ch. D., 62.

(') 4 Dowl., 574.

[3 Common Pleas Division, 368.]

April 6, 1878.

\*RAWLINS v. BRIGGS.

[368

*Landlord and Tenant—Lease, Construction of—Covenant to pay Taxes, &c.*

Under a demise of premises for twenty-one years, the lessee covenanted to pay the rent reserved "without any deduction or abatement except land tax and landlord's property tax," and further "to pay and discharge all and all manner of taxes, rates, charges, assessments, and impositions whatever (except as aforesaid) then or at any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of Parliament or otherwise howsoever."

During the term the lessor received from the sanitary authority a notice, pursuant to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94, to abate a nuisance injurious to health arising from the bad condition of the drains upon the premises, and in order to prevent proceedings against him, executed the required works:

*Held*,—upon the authority of *Tidswell v. Whitworth* (Law Rep., 2 C. P., 326),—that, the payment having been made by the lessor, not for a "rate, charge, assessment, or imposition assessed or imposed on the demised premises or in respect thereof," but in performance of a duty imposed upon him by the act of Parliament, he was not entitled to call upon the lessee under his covenant to repay the amount.

*Thompson v. Lapworth* (Law Rep., 3 C. P., 149,) distinguished.

1878

Rawlings v. Briggs.

STATEMENT OF CLAIM. 1. The plaintiff is the lessor and the defendant is the lessee of certain houses and premises known as Nos. 119 and 121 London Street, Reading, Berks.

2. By an indenture of lease of the 20th of October, 1873, the plaintiff demised the houses and premises to the defendant for twenty-one years from the 29th of September preceding, subject to the covenants and conditions therein contained.

3. The defendant thereby covenanted to pay to the plaintiff during the term the yearly rent of £85 without any deduction or abatement except land tax and landlord's property tax.

4. The defendant also covenanted thereby from time to time to pay and discharge all and all manner of taxes, rates, charges, assessments, and impositions whatever (except as aforesaid), then or at any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of Parliament or otherwise howsoever.

5. The defendant from the date of the indenture, and during the month of May, 1877, has been and still is the occupier of the houses and premises.

369] \*6. On the 14th of May, 1877, the urban sanitary authority for the borough of Reading and for the district within which the houses were and are situated, in pursuance of the powers of the Public Health Act, 1875, duly gave notice to the plaintiff that the sanitary authority, being satisfied of the existence of a nuisance injurious to health at and upon the said houses and premises, arising from the bad condition of the drains upon the premises, and from the want of sufficient drains, thereby required the plaintiff within six weeks from the service of the notice to abate the same, and for that purpose to construct a proper and sufficient covered drain or drains emptying into the sewer of the said sanitary authority, for the effectual drainage of the houses and premises, to empty and cleanse and further fill up and deodorize and arch over the existing cess-pool.

7. The notice further stated that, if the plaintiff made default in complying therewith, summary proceedings would be taken to enforce the abatement of the nuisance, and to recover costs and penalties incurred thereby.

8. Upon the receipt of this notice, the plaintiff required the defendant to execute the said works or to pay the costs thereof, but the defendant refused to execute the works or to pay for the same, and denied his liability in respect thereof.



9. Thereupon, and in order to prevent any further proceedings, the plaintiff by his servants and agents executed the works according to the notice and to the plans and directions of the sanitary authority.

10. The plaintiff has paid for the execution of the works, £25.

Claim £25 and interest.

Demurrer, on the ground that the statement of claim does not show any contract by the defendant to repay to the plaintiff money expended by the plaintiff in the improvement of the plaintiff's freehold, or expended by the plaintiff in compliance with a notice to him to construct additional drainage on his own premises. Joinder.

*Goodwin*, in support of the demurrer: The principle which runs through the cases upon this subject is, that, where the Legislature casts a duty or charge upon the owner of premises, there must be \*clear and unambig- [370] uous words to shift the burden from him to the tenant or occupier. *Tidswell v. Whitworth* (\*) is in point. There the defendant leased premises at the "clear yearly rent of £90," and covenanted that he would "pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property tax) which during the term should become payable in respect of the demised premises:" the town council gave notice to have the street in which the premises were situate sewered and paved: the lessor neglecting to do the required work, the council caused it to be done, and assessed his proportion of the expense at £213 3s. 6d., which he paid: and it was held that, the payment having been made by the plaintiff, not for a rate, assessment, or imposition which had become payable in respect of the demised premises, but for the breach of a duty imposed upon *him* by the act of Parliament, he was not entitled to call upon the defendant under his covenant to repay him the amount. *Sweet v. Seager* (\*), which was there cited, was distinguished by Willes, J., upon the ground that in that case "the tenant not only undertook to make money payments assessed upon or in respect of the premises, but also to bear burthens and to perform duties and services, and so bound himself to indemnify the landlord against a payment imposed upon him in respect of a burthen which the tenant had taken upon himself." *Thompson v. Lapworth* (\*), *Bird v. Elwes* (\*), and *Crosse v. Raw* (\*), are distinguishable upon the same ground

(\*) Law Rep., 2 C. P., 326.

(\*) Law Rep., 3 C. P., 149.

(\*) 2 C. B. (N.S.), 119.

(\*) Law Rep., 3 Ex., 225.

(\*) Law Rep., 9 Ex., 209; 10 Eng. R., 386.

1878

Rawlins v. Briggs.

as *Sweet v. Seager* <sup>(1)</sup>. The 94th section of 38 & 35 Vict. c. 55 casts upon the landlord the duty of abating a nuisance arising from the defective construction of a structural convenience.

*McCall*, contra: The payment in question was a charge, assessment, or imposition, charged or imposed upon the demised premises, or in respect thereof, within the meaning of the covenant in question. The lessor stipulates for a "clear yearly rent," free from deductions by whatsoever authority imposed. *Thompson v. Lapworth* <sup>(2)</sup> is precisely in point; and it is consistent with *Sweet v. Seager* <sup>(1)</sup>, *Bird v. Blues* <sup>(3)</sup>, and *Crosse v. Raw* <sup>(4)</sup>, which virtually overrule 371] the case of *Tidswell v. Whitworth* <sup>(5)</sup> relied upon by the defendant. The duty in question arises out of the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55). By s. 94 of that act, where a nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice to abate the nuisance is to be served on the owner, which by the interpretation clause, s. 4, means "the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." By ss. 95 and 96, the offender may be summoned before a justice who may make an order dealing with the notice. A penalty of £5 is imposed by s. 103 for disobedience of the order: and by s. 104 the costs and expenses and any penalties incurred in relation to any such nuisance are made recoverable from the occupier, who may deduct the same out of the accruing rent,—that is, in the absence of any covenant whereby the tenant agrees to take the burden upon himself. This is an imposition "in respect of the premises" within the meaning of the covenant. If *Tidswell v. Whitworth* <sup>(5)</sup> cannot be reconciled with *Thompson v. Lapworth* <sup>(2)</sup>, the later decision must prevail.

LINDLEY, J.: I am of opinion that this demurrer should be allowed. I am unable to distinguish this case from *Tidswell v. Whitworth* <sup>(5)</sup>. The question turns upon the true construction of the covenants in a lease. In the first place, there is a covenant to pay the yearly rent of £65 "without any deduction or abatement except land tax and landlord's property tax." That is only material as throwing light

<sup>(1)</sup> 2 C. B. (N.S.), 119.

<sup>(2)</sup> Law Rep., 3 C. P., 149.

<sup>(3)</sup> Law Rep., 3 Ex., 225.

<sup>(4)</sup> Law Rep., 9 Ex., 209; 10 Eng. R., 386.

<sup>(5)</sup> Law Rep., 2 C. P., 326.

upon the next covenant, by which the tenant contracts to "pay and discharge all and all manner of taxes, rates, charges, assessments, and impositions whatever (except as aforesaid) then or at any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of Parliament or otherwise howsoever." Now, the landlord must show that the money which he seeks to recover by this action comes within some or one of these words "rates, charges, assessments, \*and impositions, charged, as- [372 sessed, or imposed on the premises demised or in respect thereof." It is obvious that that alone is made a charge upon the premises which is expended by the landlord in respect thereof. In what sense is the money which the plaintiff has expended, a sum paid in respect of a charge or assessment imposed on the premises? The several sections of the Public Health Act, 1855 (38 & 39 Vict. c. 55), which have been referred to,—ss. 94, 98, 104, 207,—throw upon the landlord the duty of removing a nuisance arising from the want or defective construction of any structural convenience. The cost of that which is done in the performance of his duty cannot become a charge upon the tenant without express covenant. It seems to me that what the plaintiff was called upon to do here is precisely analogous to what the plaintiff was required to do in the case I have referred to. The language of the covenant in that case does not substantially differ from that used here: and the reasoning of the judges applies as much to this case as to that. It is said that the present covenant more nearly resembles that in *Thompson v. Lapworth* (\*), *Bird v. Elwes* (\*), and *Crosse v. Raw* (\*); and that *Tidswell v. Whitworth* (\*) is virtually overruled. But in each of those cases the language of the covenant was different from that of *Tidswell v. Whitworth* (\*), and great care was taken to distinguish them on the ground of such dissimilarity of words. In *Thompson v. Lapworth* (\*), the covenant was to pay and discharge "all taxes, rates, duties, and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the demised premises in respect thereof." Those words are much more extensive than the words used here. Willes, J., in *Thompson v. Lapworth* (\*) points out the difference between *Tidswell v. Whitworth* (\*) and that case.

(\*) Law Rep., 3 C. P., 149.

(\*) Law Rep., 3 Ex., 225.

(\*) Law Rep., 9 Ex., 209; 10 Eng. R., 386.

(\*) Law Rep., 2 C. P., 326.

1878

Attenborough v. St. Katharine's Dock Co.

The payment in question is not within the covenant, and it follows that the plaintiff cannot recover.

*Demurrer allowed, with costs.*

Solicitor for plaintiff: *W. Rawlins.*

Solicitors for defendant: *Rooke & Son*, for W. J. Brain, Reading.

See 24 Eng. Rep., 574 note.

Under the provisions of section 244 of the act providing for the assessment and collection of taxes, 1 R. S. 1876, p. 126, the tenant or occupant of real estate, from whom the taxes thereon shall have been collected, may recover, by action against the owner of such real estate, the amount which such owner ought to have paid, whether such occupant or tenant has possession of the real estate under a contract made

with such owner, or with some third person.

Hence, in such case, where S. is in possession of real estate as the tenant of H., under a written lease, he has a good cause of action against the real estate and the wife of H., the latter being the owner thereof, to recover the amount of taxes collected from him as tenant: *Hammon v. Sexton*, 69 Ind., 87.

[3 Common Pleas Division, 373.]

March 25; April 8, 1878.

**373] \*PERCY ATTENBOROUGH V. THE LONDON AND ST. KATHARINE'S DOCK COMPANY.**

**ROBERT ATTENBOROUGH V. THE SAME.**

*Interpleader—Indorsee of Dock Warrant—1 & 2 Wm. 4, c. 58, s. 1—Different Liabilities—Damages for Detention.*

L. shipped wine at Cadiz for London under bills of lading making it deliverable to D. or his assigns. D. caused it to be deposited with the defendants, a dock company, and received from them dock warrants making the wine deliverable to D. or his assigns, and these he indorsed to the plaintiff to secure the payment of advances made by the plaintiff. L. afterwards served notice upon the defendants not to part with the wine, alleging that it had been obtained from him by fraud, and the plaintiff commenced an action against them for wrongfully detaining it:

*Held*, that the defendants were not entitled to relief under the Interpleader Act; for, first, damages were claimed from them which could not be recovered against L.; and, secondly, they had, by issuing the dock warrants, induced the plaintiff to change his position.

Reversed, *post*, p. 295.

[3 Common Pleas Division, 377.]

June 28, 1878.

**\*THE GUARDIANS OF THE POOR OF THE PARISH OF [377  
ST. LEONARD'S, SHOREDITCH, V. FRANKLIN.**

*Corporation—"Person or Persons"—Common Informers (1 & 2 Wm. 4, c. LXXVI),  
ss. XLV, LXXXV—Action for Penalties.*

A corporation cannot sue for penalties as a common informer, unless expressly empowered by statute so to do.

The act 1 & 2 Wm. 4, c. lxxvi, by s. xlv, imposes a penalty on coal dealers who knowingly sell one sort of coals for another within a certain district, and the penalty is recoverable under s. lxxxv, "by the person or persons who shall inform and sue for the same":

*Held*, that a board of guardians, being a corporation, did not come within the terms of s. lxxxv, and therefore could not sue for the penalty.

CLAIM, after alleging a contract for the sale of coal to the plaintiffs by the defendant and a breach by the delivery on certain occasions of coals which were not of the quality or description ordered and contracted for, further stated that on the occasions aforesaid, the defendant being a seller of coals and dealer in coals, did knowingly sell one sort of coals for and as \*a sort which they really were not, [378 within the distance of twenty miles from the General Post-office, contrary to the form of the statutes in that behalf, and became liable to pay for every such offence the sum of £10 for every ton of coals so sold.

The plaintiffs claimed first, £300 damages for breach of contract; and, suing as well for the Queen as for themselves, also claimed £1,780.

Demurrer to that part of the statement of claim on which the claim for penalties was based, on the grounds that the plaintiffs, being a corporation, could not be a common informer or common informers, and that the plaintiffs were not empowered to sue for penalties by the act under which the claim was made (').

(1) 1 & 2 Wm. 4, c. lxxvi, "An act for regulating the Vend and Delivery of Coal in the Cities of London and Westminster," &c.

Sect. xlv enacts, That if any seller or dealer in coals shall knowingly sell one sort of coals for and as a sort which they really are not, within the port of London ... or within the distance of twenty-five miles from the General Postoffice, every such seller or dealer shall forfeit and pay for every such offence £10 per ton for every ton of coals so sold.

Sect. lxxxv enacts, That all fines, penalties, or forfeitures exceeding the sum of £25 by this act imposed for any offence or offences committed against this act shall and may be recovered by action of debt, bill, plaint, or information in any of His Majesty's courts of record at Westminster ... "by the person or persons who shall inform and sue for the same," within three calendar months after the offence or offences shall be committed; and one moiety of all such fines, penalties, or forfeitures shall be to and

*Raymond*, for the defendant: A corporation cannot sue as a common informer: Chitty's Archbold's Practice, 12th ed., p. 1145. The authority there cited is the *Weavers' Company v. Forrest* (<sup>1</sup>), in which the decision was on a point of pleading, viz., whether a defendant who had oyer of a charter was bound to insert it in his plea, but to the marginal note of the point the reporter adds, "N.B. It was held in the C. B. (where other like actions were brought) that the words of 7 Geo. 2 being 'any person or persons,' a corporation could not sue as a common informer."

In *Walker v. Richardson* (<sup>2</sup>), a lease of lands by an ecclesiastical corporation to charitable uses was held not to be 379] within \*the Mortmain Act, 9 Geo. 2, c. 36, s. 1, which prohibits conveyances of lands "by any person or persons whatsoever" in trust, or for the benefit of any charitable uses whatsoever. Parke, B., said the section extended only to grants by natural persons.

[LORD COLERIDGE, J.: Suing under the old penal statutes the informer had to make an affidavit, which a corporation would be unable to do.]

And in early times an informer had to inform *ore tenus*. The only cases of corporate informers to be found in the books are actions for penalties under the Apothecaries Act, 55 Geo. 3, c. 194, which, however, by s. 26, expressly empowers the master and wardens of the Apothecaries Company to sue: see Bullen and Leakes' Precedents of Pleading, 3d ed., p. 233. If the words "person or persons" include corporations, then the numerous interpretation clauses declaring that "person or persons" in particular acts of Parliament shall include corporations, have been needless. Corporations are not formed for purposes of suing as informers. If they could sue it is possible that a company might be established for the sole object of bringing *qui tam* actions on forgotten penalty clauses in obsolete statutes.

The case does not come within the letter of the act, which is penal, and should be construed strictly.

*Austen*, for the plaintiffs: The dictum in Chitty's Archbold's Practice, 12th ed., 1145, is founded on a mere note by the reporter of the *Weavers' Company v. Forrest* (<sup>1</sup>). But the decision in that case is not in point. Nor is *Walker v. Richardson* (<sup>2</sup>), for the object of the Mortmain Act, 9 Geo.

for the use of . . . the King, his heirs and successors, and the other moiety thereof, persons who shall inform or sue for the same."

together with double costs of suit, shall (<sup>1</sup>) 2 Str., 1241.

be to and for the use of "the person or" (<sup>2</sup>) 2 M. & W., 882, 890.

(<sup>3</sup>) 2 M. & W., 882.

2, c. 36, s. 1, as the preamble shows, was to prevent the conveyance in mortmain of lands held by "languishing and dying persons"—terms inapplicable to a corporation aggregate. The court said that the lease by a corporation of lands which were already in mortmain was neither within the words nor the spirit of that act. In "The Exposition of the Statute, 39 Eliz. c. 5" (1), which authorizes the erection of hospitals by "all and every person and persons seised of an estate in fee simple, their heirs, executors, or assigns," Lord Coke \*commenting on the phrase "all [380 and every person and persons," says: "These words regularly do extend to any body politick or corporate, but not to such as are restrained by any act of Parliament to alien, &c., but doth extend to such bodies politick and corporate as may alien, as manors and commonalties, bayliffs, and burghesses, &c., and the like, and to all other persons whatsoever." Grant on Corporations, says in a note to p. 66, that "'person' in a statute relative to forgery was held not to be applicable to the aggregate body of a corporation, *Harrison's Case* (2); but since 1 Wm. 4, c. 66, s. 28, the law is otherwise." The section provided that "person" should throughout the act be deemed to include any body corporate. So 7 & 8 Geo. 4, c. 28, for improving the administration of justice in criminal cases, declares that statutes relating to offences shall be understood to include bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction: sect. 14. Thus the tendency of the Legislature to expand the meaning of the word "person" in acts of Parliament is evident.

*Raymond*, in reply.

LORD COLERIDGE, C.J.: So far as I know, this is a case *primæ impressionis*, but not without clear authority bearing on the question although not directly deciding it. The plaintiff corporation having had bad coals supplied by the defendant, not only sue him for damages for breach of contract in failing to supply good coals, but proceed further to sue him for a large sum for the breach of duty of which he has been guilty in violating, 1 & 2 Wm. 4, c. lxxvi. The corporation say that the breach of contract was so bad that they are entitled not only to damages but to the penalties imposed by sect. xlv, which exceed the sum of £25 and are recoverable under sect. 85, "by the person or persons who shall inform and sue for the same." It is suggested that

(1) 2 Inst., 720, 722.

(2) 1 Leach, 180; 2 East, P. C., 988; 2 Russ. Crim., 385.

the corporation are within the terms of sect. 85, and can sue. Undoubtedly the corporation may be, in one sense, included within the terms "person or persons." But the act must be construed *secundum subjectam materiem*, and I must ascertain whether it would be reasonable that the corporation should be within the words. If the case had arisen 381] \*under one of the old penal statutes it would have been too clear for argument, as some of the conditions precedent to maintaining the action would have been such as a corporation could not from its very nature perform, and therefore to have held a corporation included in the words "person or persons," would have made nonsense of the act<sup>(1)</sup>. I agree that such a construction would not make nonsense of this act. But the general current of authorities seems to show that a corporation cannot be common informers. The argument that in numerous statutes corporations are empowered to sue has an important bearing against the plaintiffs, for the fact that it has been thought not only well but prudent to include corporations in special terms rather tends to show that they otherwise would not have been included. No doubt the provisions in many statutes enabling the recovery of penalties have been extended to corporations, not, however, by making corporations do things beyond their nature, but by saying that things done by others on behalf of corporations, should give them the same advantage as if done by them. The statutes as to inspection, and exhibiting interrogatories in legal procedure, &c., which prescribe that certain acts shall be done for corporations by certain officers, all tend to show that corporations are by the very necessity of their nature excluded from doing such acts.

I think it undesirable that corporations should be common informers. The general dictum of the text-books is against it. Under all the earlier statutes corporations could not have been informers, and I think they cannot be so in this case, and I must give effect to the demurrer.

*Judgment for the defendant.*

Solicitors for plaintiffs: *Carey, Warburton & De Paula.*  
Solicitors for defendant: *Ley & Mould.*

(<sup>1</sup>) See Tidd's Practice, 9th ed., p. 518.

See 38 Eng. Rep., 783 note.



[3 Common Pleas Division, 393.]

June 19, 1878.

[IN THE COURT OF APPEAL.]

\*OTTAWAY V. HAMILTON.

[393]

*Costs—Husband and Wife—Necessaries—Extra Costs in a Suit for a Divorce—Divorce Acts, 20 & 21 Vict. c. 85, ss. 51, 54, and 21 & 22 Vict. c. 108, ss. 13, 14.*

A solicitor employed by a wife to take proceedings against her husband to obtain a divorce on the ground of cruelty and adultery, may sue the husband for "extra costs," i. e., costs reasonably incurred by him beyond the costs taxed and allowed as between party and party.

His common law right to sue the husband as for "necessaries" supplied to the wife, is not to be limited to the statutable rights and remedies for costs given to the wife under the Divorce Acts.

THIS was an action brought by the plaintiff, a solicitor who had been employed by the wife of the defendant to institute proceedings against him in the Divorce Division for a divorce on the grounds of adultery and cruelty, to recover against the defendant a balance of costs alleged to have been necessarily incurred on the wife's behalf in the prosecution of those proceedings, but which had been disallowed by the registrar on a taxation as of party and party costs. The facts as proved or admitted on the trial before Denman, J., at the last Michaelmas Sittings in London, are fully detailed in the judgment delivered by the learned judge, hereafter set out, after argument upon a motion for judgment, and it is only necessary to add the following particulars. The plaintiff's bill sued in this action was made up of the following items: first, charges in respect of business done prior and leading up to the institution of the suit; these [394] charges included the costs of taking counsel's opinion and correspondence with the defendant's wife; secondly, charges arising out of proposals for a compromise of the suit in the Divorce Division made by the defendant; thirdly, payments made to a detective for procuring evidence; fourthly, payments in respect of other matters, alleged to be properly chargeable as between solicitor and client.

Feb. 23. *Waddy*, Q.C. (*Wilberforce*, with him), for the plaintiff, contended that all the costs in question were reasonably incurred by the wife, as between solicitor and client, in the prosecution of proceedings, which she had a right to institute as necessary for her protection against her husband. The following authorities were referred to and commented upon: *Turner v. Rooke* (1); *Brown v. Ack-*

(1) 10 Ad. &amp; E., 47.

1878

Ottaway v. Hamilton.

*royd* ('); *Rice v. Shepherd* ('); *Wilson v. Ford* ('); *Re Hooper* ('); *Dickens v. Dickens* ('); *Stocken v. Pattrick* (').

*J. C. Mathew*, for the defendant, submitted that these were not costs in respect of which the wife had authority to pledge her husband's credit; that the only costs for which the husband could be liable, at all events since the 20 & 21 Vict. c. 85, and 21 & 22 Vict. c. 108 ('), were the costs taxable under the decree, provision for which is usually made upon motion as the suit proceeds. He cited *Wells v. Wells* ('), *Allen v. Allen* ('), and *Bremner v. Bremner* (').

*Cur. adv. vult.*

March 5. DENMAN, J.: This was an action brought by the plaintiff, a solicitor, for £263 10s. alleged to be due from the defendant under the following circumstances: In 1875, the plaintiff was retained by the defendant's wife to institute proceedings against the defendant in the Divorce Court, for a divorce \*on the grounds of cruelty and adultery. On the 30th of June, 1876, a decree *nisi* was made for the dissolution of the marriage, which was made absolute on the 23d of January, 1877. The costs of the wife against the defendant, as between party and party, had been taxed, upon the application of the wife; but the costs for which the plaintiff sued the defendant in this action had been disallowed; and the plaintiff sought to recover them as costs which would be properly allowed as between attorney and client, and, as such, being necessities supplied to the wife.

It was agreed at the trial that I should reserve judgment upon the facts admitted, and, after argument upon those facts, decide which (if any) of the different classes of costs sought to be recovered are recoverable,—the amount due to be determined by a referee agreed upon, according to the principle laid down by me.

The facts admitted at the trial were as follows: The first bill of costs sent in by the plaintiff amounted to £544 1s. 11d. Of this sum £275 16s. 2d. was taxed off, and £269 5s. 9d. paid. A supplemental bill was afterwards brought in for £210 2s., which contained a great number of items for expenses incurred in the payment of detectives and others in obtaining information relating to the acts of adultery

(1) 5 E. & B., 819.

(2) 12 C. B. (N.S.), 332.

(3) Law Rep., 3 Ex., 63.

(4) 33 L. J. (Ch.), 300.

(5) 2 Sw. & Tr., 103.

(6) 29 L. T., 507.

(7) He referred to ss. 51 and 54 of the

former and to ss. 13 and 14 of the later act, and also to rules 151-159; see Brown's Divorce Practice, p. 518.

(8) 1 Sw. & Tr., 308.

(9) 2 Sw. & Tr., 107; 30 L. J. (P. & D.), 9.

(10) Law Rep., 1 P. & D., 254.

alleged to have been committed by the defendant in divers places.

The registrar, being of opinion that he had no power to allow these costs as between party and party, struck his pen through the whole of them in red ink, and taxed the later items of the bill at £53 18s. 6d., upon £88 11s. 10d. claimed, and so leaving untaxed, but struck out, items amounting to £112 10s. 2d. A third bill was brought in, for costs incurred in the rectification of the settlements after the decree *nisi* and before decree absolute. This bill was one for £101 9s. 1d., and was taxed down to £74 16s. 6d., and paid. The bill on which the action was brought was for the items struck out without regular taxation in the supplemental bill and for the items taxed off in the first and third bills, and was wholly in respect of work done or payments made before decree absolute.

Soon after the citation, namely, in February, 1876, an order for alimony *pendente lite* was made for payment at the rate of £188 per annum for the wife and children, commencing from the 6th of December, 1875, the date of citation. This sum was paid up to the 6th of February, [396 1877, when an order to pay permanent alimony was made. On the 25th of July, 1876, a further order for payment of an allowance of £100 per annum for the maintenance of the two younger children was made; and on the 6th of February an order was made to vary the trusts of the settlement and for permanent alimony of £300 a year and £50 for the maintenance of one of the children.

The last item in the bill of costs was dated the 6th of January, 1877. \*

The plaintiff contended that he was entitled to sue the husband for these costs, as extra costs as between attorney and client, for which a solicitor can sue his client entirely without reference to the amount which may be recovered as between party and party, and that the costs in question were recoverable against the husband as necessaries supplied to the wife. On the other hand, it was argued that the costs in question could not be so recovered, first, on the ground that they had actually been taxed by the proper tribunal and disallowed; secondly, that, at all events, they were the proper subject of taxation in the Divorce Court, and could not be sued for at common law; and thirdly, on the ground that, as to some parts at least, they were not costs incurred in order to obtain necessary protection for the wife, but only in a proceeding for a divorce, as distinguished from a proceeding for her necessary protection.

1878

Ottaway v. Hamilton.

The case most strongly relied upon for the plaintiff was that of *Stocken v. Pattrick* <sup>(1)</sup>, in which a wife having good grounds for instituting a suit for a separation on the ground of cruelty, and her attorney having brought a suit for a divorce on the ground of adultery and cruelty which was ultimately compromised by an agreement for a deed of separation, the solicitor was held entitled to sue for his costs as between attorney and client, including the costs as between attorney and client in the divorce suit.

On the argument I felt considerable doubt whether this case could be looked upon as an authority to the extent that it would authorize the attorney to sue for costs incurred solely in and about the prosecution of that branch of the suit, which went to establish the adultery of the husband; 397] but, upon considering the judgment \*of the Lord Chief Baron carefully, I think it is an authority to that effect. This and the other cases cited by Mr. Waddy seem to me to go to the full length of establishing that, where the suit is reasonably instituted in the Divorce Court for a divorce or a separation, on the ground of cruelty and adultery, or of cruelty only, then the solicitor can sue the husband for costs as between solicitor and client which he has incurred on behalf of the wife.

I think therefore that the only direction which I can give to the gentleman who has been agreed upon as the referee to settle the amount, if any, due to the plaintiff, is, that he is to be guided by what he considers to have been reasonable or unreasonable in the amount and character of the costs incurred. In considering this question, I do not think that I am warranted by the authorities in telling him to be guided by the fact, that any part of these costs have or have not been allowed as party and party costs in the Divorce Court. To do so would, I think, be to overrule *Brown v. Ackroyd* <sup>(2)</sup>, cited for the plaintiff, and *Rice v. Shepherd* <sup>(3)</sup>, in both of which it was held that the common law right of the solicitor was not to be limited by the statutable right given under the Divorce Acts. This is also strongly laid down by the Lord Chief Baron in *Stocken v. Pattrick* <sup>(4)</sup>, and is in accordance with *Wilson v. Ford* <sup>(5)</sup>.

As pointed out by Mr. Waddy, the plaintiff's rights as against the defendant are not in any way correlative to or limited by the wife's rights as against her husband; and it would be unjust to hold that everything which the registrar

<sup>(1)</sup> 29 L. T., 507.

<sup>(3)</sup> 12 C. B. (N.S.), 332.

<sup>(2)</sup> 5 E. & B., 819.

<sup>(4)</sup> 29 L. T., 507.

<sup>(5)</sup> Law Rep., 3 Ex., 63.

of the Divorce Court might hold not to fall within the definition of party and party costs, as adopted in that court, should therefore be held incapable of being recovered as costs between attorney and client, if reasonably and fairly incurred in the prosecution of a proceeding itself reasonably instituted for the protection of the wife. This, I think, is the only test, and by this test the bill must be considered by the referee. If he comes to the conclusion that any of the costs sued for, which have been disallowed by the registrar, are fair and reasonable costs as between attorney and client, he should allow them as to the plaintiff; if any appear to him to be \*unreasonable, he should disallow them; and the judgment will stand for the amount allowed. [398

The defendant appealed.

*Judgment accordingly.*

June 18, 19. *J. C. Mathew*, for the defendant, contended, first, that a suit for dissolution of a marriage was not a "necessary" for a wife, which would enable her to pledge her husband's credit; secondly, that under the Divorce Acts the only remedy for costs was to obtain from the Divorce Division an order for payment thereof after taxation; thirdly, that if the remedy by action is concurrent with the right to obtain them by order of the Divorce Division, the plaintiff by submitting his bill for taxation had made an election as to the mode of recovering them which was a bar to the present action.

*Wilberforce* (*Waddy*, Q.C., with him), for the plaintiff.

In the course of the argument the following authorities were cited in addition to the cases mentioned before Denman, J.: as to the practice of the Court of Divorce in allowing a wife's costs, *Jones v. Jones* (1); *Flower v. Flower* (2). The following statutes and rules were also referred to: as to the power of the Divorce Division to award costs and to order the same to be taxed, 20 & 21 Vict. c. 85, ss. 51, 54; 21 & 22 Vict. c. 108, s. 13; Rules of the Court of Divorce, 151 to 159: as to the power of the Divorce Division to order the rectification of marriage settlements, 20 & 21 Vict. c. 85, s. 45; 22 & 23 Vict. c. 61, s. 5.

BRAMWELL, L.J.: We need not trouble the plaintiff's counsel any further, for we are of opinion that this appeal should be dismissed. It seems to me that a suit for dissolution of a marriage stands upon the same footing as the suit formerly instituted for a divorce *à mensa et thoro* on the ground of cruelty, or adultery, or both. A suit for a

(1) Law Rep., 2 P. & D., 333.

(2) Law Rep., 3 P. & D., 132; 8 Eng. R., 613.

1878

Ottaway v. Hamilton.

divorce of that kind was primarily a suit for a separation only. Nevertheless, I think that a wife has now the same power of pledging her husband's credit for the costs due to her solicitor in a suit for dissolution of the marriage, as she formerly had for those due to her proctor in a suit in the 399] \*ecclesiastical court for a separation. The liability of a husband for his wife's costs in a suit for divorce *à mensa et thoro* was not denied by defendant's counsel; but he contended, upon several grounds, that the present action was not maintainable. I cannot agree with his argument. First, I think that a suit for dissolution of the marriage is just as much a "necessary" for a wife as a suit in the ecclesiastical court for divorce *à mensa et thoro*. Secondly, I do not think that the provisions in the Divorce Acts for the payment of costs were passed in lieu of, or in substitution for, the principle of the common law enabling a wife to pledge her husband's credit. I do not see how those statutes can be said to have taken away that principle; they certainly do not abolish it in express terms, and I do not think that they do so by implication. Suppose a husband were to die after the petition was filed, but before the decree could be pronounced against him, would not the common law liability of his estate for the costs incurred by his wife continue in full force? I therefore think that the power of the wife to pledge her husband's credit remains unimpaired. Thirdly, if the remedies for the recovery of the costs by taxation and action are concurrent, I do not think it an answer to this plaintiff's claim that he has submitted his bills of costs for taxation. There is nothing in the statutes to justify the argument. I cannot see, that because the plaintiff has obtained from the Divorce Division such sums as are allowed upon taxation, he is to be debarred from recovering the extra costs by an action against the husband. If the charges sought to be recovered have been properly incurred, the claim for costs as between solicitor and client in a suit for dissolution of marriage stands in the same plight as the claim for them in an ordinary action. Subject to the question whether they have been justifiably incurred, the defendant is bound to pay them, just as if he had retained the plaintiff to act as his solicitor.

I think it would be unreasonable to hold that the defendant's wife had not power to pledge her husband's credit for the payment of the items relating to matters occurring before the institution of the suit; as they were anterior to the suit, they were not costs in it, and could not be allowed upon taxation; but I think it impossi-

ble to say that the plaintiff would be only justified in charging \*one guinea for consultation with the de- [400 fendant's wife prior to issuing the citation; he was entitled to take the steps necessary to ascertain whether proceedings ought to be commenced. If, therefore, the wife had good ground for applying to the plaintiff, the preliminary charges would be recoverable.

It is very clear that the items as to rectifying the settlement after the decree *nisi* were part of the costs in the suit. I did feel a doubt whether the defendant's wife had not then become a *feme sole*, at least so far as to be enabled to pledge her own credit; but upon referring to the Divorce Acts, and upon considering what is their reasonable construction, it seems to me that she does not become an independent person until the decree has been made absolute (\*). The defendant, therefore, is liable to the costs of rectifying the marriage settlement.

BAGGALLAY, L.J.: The result of the suit for dissolution of the marriage has shown that it was necessary for the protection of the wife, and therefore she had authority to pledge her husband's credit for the expenses of the proceedings. I do not think that the principle of law laid down in *Brown v. Ackroyd* (\*) has been at all trenching upon by the decision in *In re Hooper* (\*). Before the Divorce Acts it was established that a proctor employed by a wife in a suit for a divorce *à mensa et thoro* properly instituted was entitled to obtain from the husband payment of the costs incurred in the suit; but it has been contended that a different principle must be applied to proceedings under the Divorce Acts, and two points arising upon them have been argued before us: first, whether by creating the power of taxation in the Court of Divorce the Legislature has taken away the right to sue in an action for the extra costs; and, secondly, if it has not, whether the plaintiff has not deprived himself of the right to sue by making what may be called an election to take the remedy by taxation. For the reasons assigned by Bramwell, L.J., I think that both those questions should be answered in the plaintiff's favor.

The claim in the present action is of course subject to taxation; \*but it resolves itself into three classes of [401 items. I will first deal with the items incurred after the filing of the petition and before decree *nisi*. These consist chiefly of expenses connected with the employment of a de-

(\*) See *Norman v. Villars*, 2 Ex. D., 193. (5 E. & B., 819; 25 L. J. (Q.B.), 359; 21 Eng. Rep., 500.

(\*) 33 L. J. (Ch.), 300.

fective. These have been disallowed upon taxation ; but I think them recoverable by the plaintiff from the defendant, if they have been properly incurred. Then as to the charges in respect of matters preliminary to the institution of the suit, it seems to me that the plaintiff's right to them is almost *à fortiori* to his right to costs after the filing of the petition. Perhaps they were not taxable as part of the costs in the suit ; but upon the facts I come to the conclusion that it was necessary to incur them. As to the third class of items, namely, those relating to the rectification of the marriage settlement, they have become payable owing to the adoption of a remedy, which the law conferred upon the defendant's wife. As they were in respect of matters done before the decree absolute, the plaintiff is entitled to recover them.

THESIGER, L.J.: I am entirely of the same opinion. It was established that a suit for a separation instituted by a wife upon proper grounds was a "necessary," and that the husband was liable to her proctor for the costs thereof ; and I think that upon principle a husband is equally liable for the costs of a suit brought for dissolution of the marriage. A suit for a separation was a "necessary," because a wife stands in need of protection from the cruelty of her husband, and a suit for dissolution is equally a "necessary" when to cruelty is superadded adultery. It may be that in some countries a marriage lawfully contracted cannot be dissolved ; but this does not seem to me to be an argument that a suit for dissolution is not a "necessary" within the meaning of that term, as it is understood in our law. It is to be recollected that the word "necessary" in its legal sense, as applied to a wife, merely means something, which it is reasonable that she should enjoy. I now come to the question whether, under the Divorce Acts, taxation is the only remedy, which the wife, or the solicitor appointed by her, has for the recovery of extra costs. If it could have been established that these statutes provide for the taxation of a wife's costs against her husband as be-  
402] tween solicitor and client, there \*would have been great force in the argument that the remedy to be adopted is the use of the process of the Divorce Division to obtain payment of them. At all events, the contention would have been well founded that where a wife or a solicitor employed by her applies to the Divorce Division to tax the costs, there would be such an election as to prevent either of them suing subsequently in an action at law. Upon referring to the statutes I do not think that they contain provisions for



the taxation of costs as between solicitor and client, so far as the present claim is concerned. By 20 & 21 Vict. c. 85, s. 51, the court is empowered "on the hearing of any suit, proceeding, or petition," to make such order as to costs as may seem just. These words seem to confer only the power of giving costs as between party and party, and in many cases the jurisdiction of the court ought to be thus confined, for it has to deal not only with husband and wife but also with other parties, at least where the husband is the petitioner. I do not think that the Rules of Court, which have been mentioned, could under any circumstances go beyond the operation of the statutes; but, further, I think that their very language indicates that the court has merely the power to give costs as between party and party; and apart from the construction which I put upon the statutes and rules, *Allen v. Allen* (\*) is a clear authority, for the proposition not only that the ecclesiastical courts used to give costs as between party and party, but also that the court established by the statutes which I have mentioned has followed a similar principle. It may well be that upon the taxation of costs as between party and party, these courts proceeded upon a more liberal principle than was formerly adopted in the courts of common law; but however that may be, so soon as it is ascertained that upon a suit in the Divorce Division costs are given merely as between party and party, it seems to follow that after giving credit for the sums recovered upon taxation the solicitor for the wife, who is entitled as against her to costs as between solicitor and client, can recover from the husband all the costs, which have been reasonably incurred with respect to the suit. At this result I should have arrived without the assistance of authority; but *Re Hooper* (†), which was the decision of a tribunal having co-ordinate \*jurisdiction with our own, and [403 *Stocken v. Patrick* (‡), entirely support the view which I have taken. I agree with the other members of this court that the items claimed seem to have been properly charged against the defendant in respect of a suit, which is proved by the result to have been reasonably instituted.

*Judgment affirmed.*

Plaintiff in person.

Solicitors for defendant: *Mead & Daubeney*.

(\*) 2 Sw. & Tr., 107; 30 L. J. (P. M. & A.), 9.

(†) 33 L. J. (Ch.), 300.

(‡) 29 L. T. (N.S.), 507.

See 28 Eng. Rep., 367 note; 29 id., 361 note.

Neither a husband nor his executors

are liable for the expenses incurred by a county in supporting his wife, who, after leaving his house, was found to

1878

Kendall v. Hamilton.

be insane, and was subsequently delivered over to the county authorities in pursuance of an order made by the court upon the discharge of a committee of her person and estate, the husband having had no notice of such proceedings: *Goodale v. Brockner*, 25 Hun, 621.

Mere separation of husband and wife is not enough to found a claim by the latter against the husband's estate for moneys expended for her support. It should also appear that she was in no default, that the husband failed to supply her with necessaries for which she had used her own moneys, and the

sources from which she had received them: *Lippincott's Estate*, 12 Philadelphia, 142.

The wife, *sous puissance de mari et séparée de biens*, in buying necessaries for the family, is presumed to act on behalf of her husband, the head of the family, and unless such presumption be rebutted in some way, as, for example, by evidence showing that the husband is insolvent, and that the duty of providing for the family devolves exclusively on the wife, she will not be held liable for the cost of such necessaries: *Brown v. Guy*, 5 Leg. News, 111.

[3 Common Pleas Division, 408.]

July 23, 1878.

[IN THE COURT OF APPEAL.]

### KENDALL and Others v. HAMILTON.

*Partnership Debt—Joint and Several Liability—Judgment recovered against one joint Contractor, and relied upon as a defense to a subsequent Action against another joint Contractor.*

Before the coming into operation of the Judicature Acts, 1873, 1875, at common law a judgment recovered against one joint contractor was a bar to a subsequent action against any other joint contractor; and in equity, although upon the death of a partner his estate might become subject to a several liability, yet during the lifetime of the partners the legal effect and incidents of a contract entered into by the partnership remained unaltered; and therefore since the coming into operation of the Judicature Acts, 1873, 1875, a contractee, who has obtained judgment against one member of a partnership for breach of a contract entered into by it, cannot maintain an action in respect of the same breach against another member of the partnership.

The defendant was interested in a contract made by the plaintiffs with the firm of W. & Co., and as to the contract was in the position of a dormant partner with respect to that firm. The plaintiffs obtained judgments against the members of the firm of W. & Co. other than the defendant in respect of breaches of that contract, and after the coming into operation of the Judicature Acts, 1873, 1875, commenced the present action against the defendant alone for certain sums of money, which were included in the judgments obtained by them against the firm of W. & Co.:

*Held*, that the cause of action against the defendant was merged in the judgments obtained against the members of the firm of W. & Co., and that the present action was not maintainable.

ACTION to recover £38,672 as damages for breach of contract by the firm of Wilson, McLay & Co., whereof the defendant was \*alleged to be a partner, and also as money payable for money paid, for money lent, for money received for the use of the plaintiffs, and for interest. The writ was issued on the 5th of July, 1877. Amongst other grounds of defence the defendant alleged that the firm of

Wilson, McLay & Co. was composed of M. Wilson and J. C. S. McLay, and that after the alleged causes of action had accrued, the plaintiffs sued M. Wilson and J. C. S. McLay, and recovered judgments against them in respect thereof. The defendant also alleged that after the recovery of the judgments Wilson and McLay became bankrupts in pursuance of the law of Scotland, and the plaintiffs proved against their estate in respect of the judgments, and that their proof was allowed, and that they received a dividend in respect of it.

The action came on for trial before Huddleston, B., without a jury, and the learned judge directed judgment to be entered for the plaintiffs. The facts of the case are stated in the judgment hereinafter set forth.

The defendant appealed.

June 4, 5, 6, 7. *Watkin Williams*, Q.C., and *C. Bowen*, for the plaintiffs.

*Benjamin*, Q.C., and *Rigby*, for the defendant.

The arguments are sufficiently noticed in the judgment delivered in this court. The following authorities were cited:—as to whether the defendant could be made liable as a dormant partner, after judgment had been obtained against the ostensible partners of the firm of Wilson, McLay & Co., *De Mautort v. Saunders* (1); *Bonfield v. Smith* (2); as to the effect of a judgment in merging the original debt, *Ex parte Waterfall* (3); *Ex parte Higgins* (4); as to the effect of a contract made by some of the partners on behalf of all the partners, *MacLae v. Sutherland* (5); that a contract by partners is several as well as joint, *Lane v. Williams* (6); *Bishop v. Church* (7); *Rice v. Shute* (8); *Richards v. Heather* (9); *Ex parte Thornton* (10); as to the liability of the estate of a deceased partner, *Gray v. Chiswell* (11); *Lodge v. Prichard* (12); that the construction of a covenant by partners was the same in equity as at law, *Wilmer v. Currey* (13); *Sumner v. Powell* (14).

*Cur. adv. vult.*

July 23. The judgment of the Court (Brett, Cotton and Thesiger, L.JJ.,) was delivered by

(1) 1 B. & Ad., 398.

(2) 12 M. & W., 408.

(3) 4 De G. & Sm., 199.

(4) 3 De G. & J., 33.

(5) 3 E. & B., 1.

(6) 2 Vern., 277, 292.

(7) 2 Ves. Sen., 100, 371.

(8) 5 Burr., 2611.

(9) 1 B. & Ald., 29.

(10) 3 De G. & J., 454.

(11) 9 Ves., 118.

(12) 1 De G. J. & S., 610.

(13) 2 De G. & Sm., 347.

(14) 2 Mer., 30.

COTTON, L.J.: This was an appeal from a decision of Huddleston, B., who, after trying the case without a jury, gave judgment in favor of the plaintiffs. The action was to recover a sum of money alleged to be due to the plaintiffs under a contract made by them with the defendant. The contract, on which the action was founded, was in fact made by the firm of Wilson, McLay & Co. In that firm the defendant was not a partner; he was, however, jointly interested with the firm of Wilson, McLay & Co., in certain adventures, in respect of which the contract sued upon was made. But his connection with them in the matter was not known to the plaintiffs till long after the time, at which the contract sued upon was made. He was, as regards his liability to the plaintiffs, in the position of a dormant partner. In the month of April, 1874, after the claim which is the subject of this action had arisen, there was a meeting between the plaintiffs and the partners in the firm of Messrs. Wilson, McLay & Co., or some of them, at which the defendant was present, and, in our opinion, the fair result of the evidence is that the plaintiffs then learned that the defendant had an interest in the contract sued on. The plaintiffs claim that a large sum was due to them under that contract, and in August, 1874, they obtained judgment on the contract against the members of the firm of Messrs. Wilson, McLay & Co. for a considerable sum, and afterwards, in the month of September in the same year, for a further sum. The sums covered by these judgments included what is sought to be recovered in the present action. In the following year Messrs. Wilson, McLay & Co. became bankrupts in Scotland, and the plaintiffs proved against their estate. The appellant relied on what took place in or 406] with \*reference to the Scotch Bankruptcy or sequestration as an answer to the plaintiffs' action. Afterwards, that is to say, in the month of July, 1877, the plaintiffs commenced this action against the defendant Hamilton alone, and after hearing the case, Huddleston, B., gave judgment in favor of the plaintiffs.

The defendant appealed, and the point principally relied upon by his counsel was the effect of the judgments obtained by the plaintiffs against the persons constituting the firm of Wilson, McLay & Co. It was contended that the contract, on which the plaintiffs are now suing, was the joint contract of the defendant and those persons, and that the judgments recovered against some of the joint contractors are a bar to an action against the other co-contractor, on the ground that the original cause of action is merged in the superior

obligation of the judgments. It was contended, on the part of the plaintiffs, that even at law this was not the effect of the judgments. We are of opinion that this contention on behalf of the plaintiffs cannot be maintained, and that at law the judgments obtained against Wilson, McLay & Co. would be a bar to the action: see *King v. Hoare* <sup>(1)</sup>.

The plaintiffs, however, also contended that whatever might be the effect at common law of the judgments, every partnership contract is in equity several as well as joint, that the High Court is now a court of law and equity, and that the court, having regard to the rules of equity, is bound to hold that the plaintiffs can sue the defendant as on a several contract, and are not barred by the judgments recovered in the actions against the other parties interested in the joint adventure. And it was on this ground that Huddleston, B., decided in favor of the plaintiffs. There is no doubt that the judgments referred to will not bar the present action, if the contract entered into by Wilson, McLay & Co. on behalf of themselves and the defendant is to be considered several as well as joint. The plaintiffs, in support of their proposition that the contract is several as well as joint, have relied on a long series of cases in the Court of Chancery, in which, in administering the estate of a partner who died leaving partners or a partner him surviving, the court has admitted the creditors of the partnership to prove against the estate of the deceased partner, though at \*law the survivor was alone liable, and, though it [407 was originally doubted whether this could be done, has even allowed partnership creditors to institute proceedings for the purpose of obtaining administration of the estate of the deceased partner and payment out of his assets. It was contended that these authorities are founded on and establish the principle, that in equity every partnership contract is several as well as joint; and in support of this view the plaintiffs refer to expressions used by Sir William Grant in *De Vaynes v. Noble* <sup>(2)</sup>, and by Sir John Leach in *Wilkinson v. Henderson* <sup>(3)</sup>, which state in general terms that in equity a partnership contract is several as well as joint; and they also refer to similar expressions used by the present Master of the Rolls in the case of *Beresford v. Brown- ing* <sup>(4)</sup>. It is now well established that a court of equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as es-

<sup>(1)</sup> 13 M. & W., 494.

<sup>(2)</sup> 1 Mer. (Sleech's Case), at p. 564.

<sup>(3)</sup> 1 My. & K., at p. 588.

<sup>(4)</sup> Law Rep., 20 Eq., at p. 573.

established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor.

There is however no case in which the point now to be decided has ever arisen, and the question is whether the decisions, to which we have referred, do establish a principle, which supports the plaintiffs' contention in the present action. It is difficult to understand how the Court of Chancery came to interfere with the legal liability of partners, and although it has done so, it has, in giving the partnership creditor relief, dealt with him in an anomalous way, that is to say, except in cases where there has been no joint estate, the court has only admitted the partnership creditors to rank against the estate of the deceased, after all his private or separate debts have been paid. This is not consistent with the view that the contract of the deceased with these creditors is several as well as joint. Lord Eldon does not seem to have considered that the relief thus given to the partnership creditor was to be considered as establishing a principle, that in equity a partnership contract is for all purposes or in the lifetime of the co-contractors to be considered several as well as joint; for \*in *Ex parte Kendall* (\*) he says: "Upon the authority referred to and others, where parties think proper to enter into a joint instead of a joint and several contract, though I am surprised that courts of equity have not left that to its fate as a joint contract, they have, I admit, said that there is a remedy against the assets of one deceased, if the survivors cannot pay." And in *Beresford v. Browning* (†) Lord Justice James says that the more accurate mode of expressing the rule applicable to partnership contracts is, "that so far as regards partners where there is in equity no survivorship of property, there is in equity no survivorship of liability." It must also be remembered that the Court of Bankruptcy is a court of equity as well as of law, and that in bankruptcy a partnership creditor is not, where there are any joint assets, entitled to prove against the separate estate in competition with the separate creditors, but can only obtain payment out of the separate assets, when all the separate creditors are paid. This affords a strong argument in favor of the view that the decisions in equity, on which the plaintiffs rely, do not establish the proposition, that partnership contracts are for all purposes to be treated as several as well as joint. With the exception of those cases, where relief has been given in equity against partners for breaches of trust or other torts

(†) 17 Ves., 519.

(\*) 1 Ch. D., 30, at p. 34; 15 Eng. R., 637.

(where the relief is always several as well as joint), courts of equity have given relief in respect of partnership contracts, when in consequence of the contract being at law joint only there has been no remedy at law, only where the claims have been against the estate of a partner who has died leaving others him surviving. In our opinion, instead of holding that these cases establish the principle that all partnership or mercantile contracts are for all purposes several as well joint, it is more correct to say that relief was originally given in these cases as a consequence, which equity attributed to the rule, *Jus accrescendi inter mercatores locum non habet*, namely, that as the estate of the deceased notwithstanding his death retained an interest in the partnership property, his estate ought not to be protected or relieved by his death from liability in respect of contracts of which it still retained the benefit, and that to this extent partnership contracts were to be considered \*several; or, in other words, [409 that in partnership contracts, of which the profit does not go exclusively to the survivors, there is in the view of a court of equity an implied stipulation that in the event of the death of any of the contractors his estate shall still remain liable, and that in this way the estate of each partner is in equity severally liable. This is probably the explanation of what is said by Lord Eldon in *Ex parte Kendall* ('): "Without going through all the authorities and repeating Lord Thurlow's doubt in *Hoare v. Contencin* (\*), and my own surprise, that a court of equity should have interposed to enlarge the effect of a legal contract, the modern doctrine certainly is, that where a man has chosen to take the joint credit of several, though at law his security is wearing out as each of his debtors dies, yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a court of equity will, under certain modifications, constitute that demand." Whether or no the courts of equity were right in thus interfering with the legal effect of partnership contracts, it is well established that relief will be given against the estate of a deceased partner; but in our opinion the cases in which this relief has been given cannot be considered as establishing, that partnership contracts are to be considered several for all purposes, and so as to alter during the lifetime of the parties the effect and incidents of the contracts. In our opinion the expressions used by the learned judges above referred to must be understood with reference to the cases in which they are used, and as stating either that as

(') 17 Ves., 525.

(\*) 1 Bro. C. C., 27

regards the estate of a deceased partner the contract must be treated as several, or as shortly though somewhat inaccurately stating the effect which a court of equity after the death of one of several partners gives to these contracts. It is unnecessary to go through the numerous cases which were cited during the argument, but it will be right to refer to the cases of the *Liverpool Borough Bank v. Walker* <sup>(1)</sup> and *Jacomb v. Harwood* <sup>(2)</sup> as in those cases judgments recovered against some of several partners were held not to be a bar to proceedings in equity against the estate of a deceased partner. But in each of these cases the judgment was not 410] recovered \*until after the death of the partner, against whose estate the creditor was seeking relief; and the cases, in which relief has been given in equity against the estate of a deceased partner, certainly establish that from and after his death his estate is subject to a separate or several liability. This does not establish that a partnership contract in its inception or during the lives of all the co-contractors is several as well as joint. In our opinion, the cases relied on do not establish any principle, which entitles the plaintiffs to be relieved from the legal effect of the judgments obtained by them against the defendant's co-contractors, Messrs. Wilson, McLay & Co., and we hold that these judgments are a bar to the present action.

The appeal must be allowed, and the judgment of the court below reversed with costs, including the costs of the appeal.

*Judgment reversed.*

Solicitors for plaintiffs: *Freshfields & Williams.*

Solicitor for defendant: *John W. Sykes.*

<sup>(1)</sup> 4 De G. & J., 24.

<sup>(2)</sup> 2 Ves. Sen., 265.

See 19 Eng. Rep., 647 note; 17 id., 184 note; 11 Am. Dec., 691 note.

A recovery against one or more joint tortfeasors, whether in contract or tort, is not a bar to an action against another without satisfaction: *Cohn v. Goldman*, 43 N. Y. Superior Ct. Rep., 436.

A recovery upon a note given for an indebtedness is no bar to a suit in equity to foreclose a mortgage given to secure the note: *Conn., etc., v. Jones*, 1 McCrary, 388.

The recovery of a judgment against one of several joint debtors is a bar to any remedy against the one not sued: *Robinson v. Snyder*, 74 Ind., 110; *Larve v. Brandon* 48 Wisc., 633.

Where, in an action against partners upon a partnership obligation, separate judgments are entered against each of the defendants instead of a joint judgment against all, this is an irregularity merely; and the court has no power to set aside the judgments on motion, unless motion is made within one year after their rendition: *Judd, etc., v. Hubbell*, 76 N. Y., 543.

Where, in an action brought against two sureties to a joint undertaking, both of the sureties are served, but judgment is entered against one only, such judgment cannot be enforced against the surety against whom it is entered for more than one half of the amount due on the undertaking.



Kendall v. Hamilton.

1878

The other surety is, by such entry of judgment against his co-surety, only released from all liability to the obligor, and cannot be called upon for contribution by his co-surety: *Waggoner v. Walrath*, 24 Hun, 443.

A judgment at law was recovered by the complainant against the defendant and one M., on a joint and several promissory note given by them to complainant, for a partnership debt. At the defendant's repeated requests, and on his promise to pay one half of the judgment and costs if he would do so, the complainant obtained from M. payment of one half, and released him from all liability on the judgment. Held, that the defendant should be enjoined from taking advantage at law of such release to cancel the judgment, and thereby avoid the payment of his share: *Cregar v. Cramer*, 31 N. J. Eq., 375.

A defendant cannot file the same matter in set-off in two separate suits pending against him at the same time: *Chase v. Strain*, 15 N. H., 535.

Where defendant held a note against plaintiff at date of plaintiff's suit, which afterwards, and during the pendency of plaintiff's suit, passes into judgment, he cannot file either the note or the judgment in offset to plaintiff's claim: *Andrews v. Varrell*, 46 N. H., 17.

A discharge in bankruptcy operates to discharge a debt in existence at the time of the adjudication in bankruptcy, and upon which a judgment is thereafter obtained.

The defendant may be relieved by motion after judgment: 29 Eng. Rep., 398 note; *World Co. v. Brooks*, 7 Abb. (N.S.), 212; *Dawson v. Hartsfield*, 79 N. C., 334.

See *Bourne v. Maylin*, 3 Woods' U. S. R., 724.

The representatives of a deceased partner cannot be joined as defendants with the surviving partner, in an action upon a partnership debt, unless the complaint show plaintiff's inability to procure satisfaction from the survivor: *Note to Cowell v. Sykes*, 2 Russell, 196, Banks's ed.

**Canada, Upper:** *Bolckow v. Foster*, 24 Grant, 333, 25 id., 476, overruling *Sykes v. Brockville*, etc., 9 id., 9.

**New York:** *Voorhies v. Child*, 17 N. Y., 354, 18 Barb., 592; *Union Bank v. Mott*, 27 N. Y., 636; *Ruhler v. Pop-*

*penhausen*, 42 id., 373; *Hauck v. Craighead*, 67 id., 432, reversing 8 Hun, 237; *Morehouse v. Ballou*, 16 Barb., 289; *Bank v. Corlies*, 1 Abb. (N.S.), 413, 417; *Smith v. Barlow*, 10 Paige 101; *Higgins v. Freeman*, 2 Duer, 650; *Copcutt v. Merchants*, 4 Bradf., 18.

See *Tracy v. Suydam*, 30 Barb., 110; *Stahl v. Stahl*, 2 Lans., 60.

**Ohio:** See *Hunt v. Gaylor*, 25 Ohio St. R., 620.

**United States, Supreme Court:** See *Lewis v. United States*, 92 U. S. R., 622 *et seq.*

So as to any parties who were originally jointly liable.

**English:** *Williams on Per. Prop.*, 283 marg. p.

**New York:** *Bradley v. Burwell*, 3 Den., 61; *Yorks v. Peck*, 14 Barb., 647-8; *McVean v. Scott*, 46 id., 379; *Hulbut v. Ferguson*, 40 How. Pr., 478.

Where an action is commenced by service of process upon one only of several defendants jointly indebted, and the defendant served dies before judgment and before the others are brought in, an order to continue the action against the personal representative of the deceased defendant is not proper. The action should be continued against the other defendants: *Fine v. Righter*, 3 Abb. Pr. (N.S.), 385.

In case of the death of one party *severally* liable while suit is pending, the court may allow the action to be revived against his representative as a several action: *McVean v. Scott*, 46 Barb., 379; *Union Bank v. Mott*, 27 N. Y., 636.

By the statute of 1832 (4 Edm. St., 453), the representatives of a party to a promissory note may be joined with the survivors: *Churchill v. Trapp*, 3 Abb. Pr., 306.

But see *Bank v. Corlies*, 1 Abb. (N.S.), 417; *Morehouse v. Ballou*, 16 Barb., 289.

But separate judgments must be entered against the defendants in such action: *Churchill v. Trapp*, 3 Abb., 306.

See *Union Bank v. Mott*, 27 N. Y., 637.

The rule that the representatives of a deceased party cannot be joined with the survivor, unless the latter be insolvent, does not apply to cases against trustees for a breach of trust: *Sortore v. Scott*, 6 Lans., 271.

Suit on a joint and several bond may

1878

Kendall v. Hamilton.

be brought against the executors of a deceased obligor together with the surviving obligors.

The rule as to showing the insolvency of the surviving obligors, before a suit can be maintained against the representatives of a deceased obligor, has no application to a case of several liability: *U. S. v. Tracy*, 8 Benedict, 1.

An assignee for the benefit of creditors of an insolvent copartnership, the representatives of a deceased partner and the surviving partners may properly be joined as parties defendant, and an action may properly be brought against them by a creditor of the firm, to compel the assignee to account and pay over to plaintiff his share of the proceeds of the partnership property, and (it being alleged in the complaint that the surviving partners are insolvent) to recover of the representatives the balance of plaintiff's claim: *Haines v. Hollister*, 64 N. Y., 1.

If the complaint show plaintiff's inability to procure satisfaction from the survivor, it shows a good cause of action against the representatives of the deceased, and it is not necessary to show that the remedy asked against him has been exhausted.

**New York:** *Riper v. Poppenhausen*, 43 N. Y., 68; *Pope v. Cole*, 64 Barb., 406, 55 N. Y., 124; *Pope v. Cole*, 66 Barb., 282.

But where the liability is several as well as joint, the representatives of a deceased party so liable may be sued separately.

**New York:** *Union Bank v. Mott*, 27 N. Y., 636.

The objection that the representatives of a deceased party cannot be joined with a survivor, must be taken by demurrer and not by answer: *Higgins v. Freeman*, 2 Duer, 650.

Where one of two joint sureties dies, the survivor is liable for the entire debt: *Comins v. Pottle*, 22 Hun, 287.

The personal representative of the survivor of two executors who receive money as such in a judgment reversed, is liable in a suit to recover back the money so paid: *Scholey v. Halsey*, 72 N. Y., 578.

The death of a mere surety in fact, jointly liable only, discharges his estate absolutely from all liability upon his obligation at law and in equity, even though he were originally sever-

ally liable, and the joint liability at his death arose from the recovery of a joint judgment.

**Illinois:** *Conover v. Hill*, 76 Ills., 342.

**Ireland:** *Henry v. Archibald*, Irish R., 5 Eq., 559.

**New York:** *Hauck v. Craighead*, 67 N. Y., 432, reversing 8 Hun, 237; *Getty v. Binse*, 49 N. Y., 385; *Risley v. Brown*, 67 id., 160; *Wood v. Fisk*, 63 id., 245, reversing 4 Hun, 525; *Davis v. Van Buren*, 72 N. Y., 587; *Bradley v. Burwell*, 3 Den., 65; *Hulbut v. Ferguson*, 40 How. Pr., 478; *Carpenter v. Prevost*, 2 Sandf., 537.

See N. Y. Code Civil Procedure, § 758; *Hunt v. Church*, 73 N. Y., 615; *Holmes v. St. John*, 8 Hun, 166; *Johnson v. Harvey*, 84 N. Y., 363.

**United States, Supreme Court:** *U. S. v. Price*, 9 How. (U.S.), 89, 95; *Pickersgill v. Lohens*, 15 Wall., 140.

**United States, Circuit and District:** *Fielden v. Lohens*, 6 Blatchf., 524; *U. S. v. Archer's Exrs.*, 1 Wall. Jr., 173, overruling *U. S. v. Cushman*, 2 Sumn., 426.

So, on death of a joint debtor after judgment, where he is not personally served, his representatives cannot be summoned under section 375 of the New York Code (old): *Foster v. Wood*, 30 How. Pr., 284, 1 Abb. (N.S.), 150.

Though where one is apparently a principal debtor and not a surety, his personal representatives are liable, notwithstanding he was in fact a surety, unless his suretyship was known to the holder or he had notice thereof: *First, etc., v. Morgan*, 73 N. Y., 593.

In *U. S. v. Price*, it was conceded that a judgment which had become by statute an express lien upon the real estate of the judgment debtor, could be enforced by *scire facias* against such real estate (9 How. U. S. R., 87-8), notwithstanding the death of the judgment debtor, was a joint surety.

The rule and the reason upon which it was based were elaborately discussed in *Stiles v. Brock*, 1 Penn. St. R., 215, 216-8.

And are fully considered by Mr. Conway Robinson: 3 Rob. Pr., 107 *et seq.*

See also *Reed v. Garvin*, 7 Watts & Serg., 354; *Erwin v. Dundas*, 4 How. U. S. R., 58, 77-9; *Taylor v. Doe*, 13 id., 287, 292-4; *Foster v. Hooper*, 2 Mass., 572.

In New York it is expressly provided that (2 R. S., 87, § 27, 2 Edm. St., 89).

"§ 27. Every executor and administrator shall proceed with diligence to pay the debts of the deceased, and shall pay the same according to the following order of classes: \* \* \*

"3. Judgments docketed and decrees enrolled against the deceased, according to the priority thereof respectively."

This is a statutory right exclusively: *Ainslie v. Radcliff*, 7 Paige, 439; *Goodyear v. Watson*, 14 Barb., 487.

This provision in general applies to all judgments against the deceased, and is mandatory. The representative must pay, in the order fixed, all judgments against the deceased: *Goodyear v. Watson*, 14 Barb., 481; *Matter of Place*, 1 Redf. Surr. R., 279; *Ainslie v. Radcliff*, 7 Paige, 439.

And this provision applies, whether the judgment was ever docketed or ever become a lien upon real estate or not: *Hamed's Case*, 4 Abb. Pr., 270-1; *Trust v. Harned*, 4 Bradf. Surr. R., 213.

Though an obligation be joint, on proof that the intestate received part of the consideration his representatives

are liable: *Dunlap's note to Rawstone v. Parr*, 3 Russ., 541, Bank's ed.

*Ireland: Furlong v. Scallan*, Irish R., 9 Eq., 202.

*New York: Hulbut v. Ferguson*, 40 How. Pr., 478; *Yorks v. Peck*, 14 Barb., 644.

Where a bond stipulated that the surety bound himself, his "heirs, executors and administrators," it was held that his liability for his principal was not terminated by his own death, but extended to his heirs and legal representatives: *Royal, etc., v. Davies*, 40 Iowa, 469.

Where a surviving surety is compelled to pay the whole of a joint obligation, he is entitled to contribution from the representatives of a deceased co-surety.

*Illinois: Conover v. Hill*, 76 Ills., 342.

*New Jersey: Shurtz v. Howell*, 30 N. J. Eq., 418, affirmed 31 id., 796.

*New York: Cornes v. Wilkin*, 79 N. Y., 129, 14 Hun, 428; *Johnson v. Harvey*, 84 N. Y., 363; *Bradley v. Burwell*, 3 Den., 65-8; *Helmer v. St. John*, 8 Hun, 166.

*Ohio: Camp v. Boswick*, 20 Ohio St. R., 337, 5 Am. R., 669.

[3 Common Pleas Division, 410.]

July 3, 1878.

## HAYN, ROMAN & CO. V. CULLIFORD & CLARK.

*Ship—Bill of Lading—Signed by Charterers—Agents for Owners—Excepted Perils—Negligent Stowage—Liability of Owners.*

Bags of sugar, shipped by the plaintiffs, were carried in the defendants' steamship from Hamburg to London at an agreed freight. The vessel was chartered for the voyage by P. & K., but the plaintiffs had no knowledge of the charter. The plaintiffs received a bill of lading by the terms of which the sugar was to be delivered in good order, the usual perils and "all accidents, loss, and damage of whatsoever nature or kind, and howsoever occasioned . . . from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted, and it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper, owner, or consignee thereof, and the ship and shipowner be considered the servants of such shipper, owner, or consignee." This bill of lading was signed "P. & K., agents." It is a custom in the case of steamships for the brokers, and not the master, to sign the bills of lading.

Oxide of zinc in casks was negligently stowed above the sugar and consequently damaged it. In an action for the damage, the court, being empowered to decide \*questions of fact, and finding that the bill of lading was signed by P. & K., [4] 1 as agents for the defendants and with their authority:

1878

Hayn v. Culliford.

*Held*, that the defendants were bound, and even assuming the absence of such actual authority would have been, under the circumstances, bound by the bill of lading; that the damage from negligent stowage was not within the exceptive clause; and that, therefore, the plaintiffs were entitled to recover.

**FURTHER CONSIDERATION.** The case was tried and argued before Denman, J.

The pleadings, facts, and arguments are sufficiently set forth in the judgment.

June 18, 22. *Butt*, Q.C., and *J. C. Mathew*, for the plaintiffs. [They cited, in addition to the authorities mentioned by the court: *Schuster v. McKellar* (\*); *MacLachlan on Shipping*, 2d ed., p. 366; *Abbott on Shipping*, 11th ed., p. 307; 1 *Parsons on Shipping*, p. 185; *Fletcher v. Rylands* (\*); *Jones v. Festiniog Ry. Co.* (\*); *Alston v. Herring* (\*); *Brass v. Maitland* (\*); *Ohrloff v. Briscall* (\*); *Steel v. State Line Steamship Co.* (\*); *Blaikie v. Stenbridge* (\*).]

*Watkin Williams*, Q.C., and *C. Bowen*, for the defendants. [They referred to the following additional cases: *Mitcheson v. Oliver* (\*); *Murray v. Currie* (\*); *British Columbia Saw Mill Co. v. Nettleship* (\*).]

July 3. DENMAN, J., delivered judgment as follows:

The plaintiffs in their statement of claim alleged that they delivered to the defendants 280 bags of sugar in good condition, to be carried by the defendants' steamship *Cleanthes* from Hamburg to London for agreed freight, upon the terms of a bill of lading by which the goods were to be delivered in like condition, certain perils only excepted (by which perils it was alleged delivery in good condition was not prevented); that the defendants did not deliver the goods in good condition, but damaged and unmerchantable; and [412] that such damage was caused by the sugar \*becoming tainted with oxide of zinc, owing to the improper and negligent stowing of their goods and the cargo.

The defence so far as it is material to the questions remaining for my decision, was as follows: That the ship was before the time mentioned in the statement of claim chartered for a voyage from Hamburg to London under a charterparty by which it was agreed that the ship should be under the control of the charterers, and that the master of

(1) 7 E. & B., 704; 26 L. J. (Q.B.), 281.

(2) Law Rep., 3 H. L., 330.

(3) Law Rep., 3 Q. B., 733.

(4) 11 Ex., 822.

(5) 6 E. & B., 470; 26 L. J. (Q.B.), 49.

(6) Law Rep., 1 P. C. App., 231.

(7) 3 App. Cas., 72; 24 Eng. R., 37.

(8) 6 C. B. (N.S.), 894; 28 L. J. (C.P.),

329.

(9) 5 E. & B., 419.

(10) Law Rep., 6 C. P., 24, at p. 2.

(11) Law Rep., 3 C. P., 499.

the ship should act as the servant and agent of the charterers for the purpose of signing bills of lading, and not as servant or agent of the defendants; that, in pursuance of the charterparty, a cargo shipped by different shippers, including the 280 bags shipped under the bill of lading mentioned in the statement of claim was taken on board; that the goods were not delivered to the defendants, but to the charterers or the master as their servant or agent, and not otherwise; that the shippers of the sugar and the plaintiffs had notice of the charterparty, and that the master was servant and agent of the charterers to sign bills of lading, and not servant or agent of the defendants; that the bill of lading contained a clause by which the defendants would not be liable for the damage complained of, even if bound by the bill of lading; and that the damage, if any, and the delivery in bad condition, were acts and defaults for which the charterers and not the defendants were responsible.

The charterparty, which was put in at the trial, was dated the 15th of November, 1877, and was made between the defendants, "owners of the steamship *Cleanthes*," and "Messrs. Pott & Korner, merchants, by the intercession of the ship-broker W. Zoder," and bound the ship, after discharging her inward cargo, to load from the said merchant, a full and complete cargo of general lawful merchandise, and proceed to one wharf only in London, as ordered by charterers' correspondents, and deliver the cargo on payment of freight (for sugar) at the rate of 7*s.* 6*d.* sterling, in full, per ton, gross weight delivered; "it being agreed that for the payment of all freight, dead freight, and demurrage, the said master or owner shall have an absolute lien . . . on said cargo, which lien they shall be bound to exercise: the charterers' liability to cease when cargo is shipped and bills of lading signed: the captain shall sign bills of lading at rates as presented, without prejudice to this charterparty."

\*The charterparty was signed by "H. W. Pott & [413 Korner," and "By telegraphic authority of Owners, W. Zoder, as agent."

Alphonse Roman, one of the plaintiffs, who was examined at the trial, swore that his firm had no knowledge of the existence of a charter until the 10th of December, after a claim had been made upon the defendants for the damage for which this action was brought.

The plaintiffs bought the sugar in November, and received the bill of lading after paying for it, and gave the bill of lading to Messrs. Middleton, wharfingers, who took the bill

1878

Hayn v. Culliford.

of lading and got delivery from the ship. The freight at the bill of lading rate was paid to one Watkins who, according to an answer to one of the interrogatories administered by the plaintiffs to the defendants, "acted as broker for the ship in London." Watkins received the freight, and gave a receipt to the plaintiffs headed "Freight per Cleanthes," and signed "Received for the owners."

It was admitted at the trial that the sugar was damaged by improper stowage; but there was no evidence as to the employment or otherwise of a stevedore, except that in the answers to interrogatories the defendants said they believed that the cargo was stowed by a stevedore employed by Zobel, who was the agent of the ship at Hamburg, at the expense of the ship.

A letter was read at the trial, of the 4th of December, 1877, in which the defendants' firm in London wrote to the same firm at Sunderland, stating that a serious claim was pending, "apparently through the fault of the captain," expressing a hope that the amount of damage might turn out to have been exaggerated, and containing this passage, "Watkins will, no doubt, make best of case for steamer: but, why the captain stowed poison in casks on top of sugar in bags it is difficult to understand and may prove serious to him."

On the 5th of December the plaintiffs wrote to Watkins and to the defendants, informing them of the damage, and inclosing their claim for the full value of the sugar as being rendered totally worthless. On the 6th Watkins wrote denying that there was any proof of the sugar being damaged or totally spoilt, and adding that, "if damaged, no doubt it was by perils of the sea." On the 10th of December Watkins, by the desire of the defendants, referred the plaintiffs to the charterers.

414] \*Evidence was given at the trial, and admitted subject to objection, that in the case of steamships, it is uniformly the custom for the broker of the ship, and not the master, to sign the bills of lading. The witnesses who proved this usage said, on cross-examination, that the brokers frequently charter the ship, and, when they sign bills of lading for chartered ships, sign them for the owner or for the charterer, according to the authority they may have; and, on re-examination, said that, if they are themselves the charterers, they would sign it in their own name.

The bill of lading relied upon by the plaintiffs was objected to by the defendants' counsel as evidence in the cause, on the ground that it was signed by Pott & Korner, agents,

and that there was no evidence of any authority to them to sign it on behalf of the shipowners. I admitted it subject to objection; and it was, I think, admissible in evidence, if on no other ground, because it was referred to in the pleadings, and not denied to exist; on the contrary, it was in part set out by the defendants in order to raise one of their defences. The question of course was still open to the defendants whether it was binding upon them, and whether, if binding, it exempted them from liability.

The question then arises, was there, under the circumstances of the case, any contract between the plaintiffs and the defendants for the carriage of the goods in question, or was this a contract with the charterers Pott & Korner.

It was submitted, on behalf of the defendants, that the very form of the bill of lading, coupled with the fact that Pott & Korner had in fact a charter on the ship, was conclusive against any liability on the shipowners.

The bill of lading, omitting the exceptive clause, on which the second contention of the defendants depends, was as follows: "Shipped in good order and well conditioned in and upon the good steamship *Cleanthes*, whereof is master P. Andrews, now lying at Hamburg and bound for London, 280 bags, &c., which are to be delivered in like good order to Hayn, Roman & Co. (the plaintiffs) or their assigns, freight at the rate of 7s. 6d. sterling, + 10 per cent., per ton gross weight, to be paid by consignees. In witness whereof the master or agent of the said ship has signed four bills of lading of this tenor and date, &c. Dated in Hamburg, this 19th day of November, 1877: Pott & Korner, agents."

\*It was contended that, inasmuch as Pott & Korner [415 were in fact the charterers, whether on their own behalf or on behalf of other persons unknown, it ought to be presumed, in the absence of any express evidence of authority to sign the particular bill of lading on behalf of the shipowners, that it was signed by them on their own behalf and not on behalf of the defendants, and that, so far as this was a question of fact, I ought so to find.

It was agreed at the trial that, except so far as the question of damages was concerned, all questions of fact and inferences of fact arising upon or to be drawn from the evidence were to be disposed of by me or by any court before whom the case may come.

Looking at all the facts of the case, I am of opinion that the bill of lading was in fact signed by Pott & Korner not on their own behalf but as agents for the shipowners and with their authority, and that it is on that ground a docu-

1878

Hayn v. Culliford.

ment binding upon the shipowners, the defendants. I think it impossible to doubt that the defendants knew that bills of lading were to be signed and had been signed on their behalf by Pott & Korner, and only repudiated the bill of lading in question after they knew that a heavy claim had arisen upon it. The letters and telegrams put in at the trial and upon the argument seem to me to establish beyond all doubt that the bill of lading was their contract with the plaintiffs as shippers or consignees of the goods.

This renders it unnecessary to consider minutely the other two grounds upon which the plaintiffs contended that the defendants would be liable, even if the bill of lading was not binding upon them as a document signed with their actual authority. I think that, even in that case, there would have been strong reason for holding that the defendants were liable.

The result of the able and elaborate argument before me was, to convince me that, under circumstances such as those of the present case, the defendants would be responsible, upon the principles explained in *Sack v. Ford* (\*), *Sandeman v. Scurr* (\*), *The St. Cloud* (\*), and *Gilkison v. Middleton* (\*).

The plaintiffs in the present case had no notice whatever 416] of any \*charterparty until after the damage. The bill of lading, though not signed by the master, was signed by persons purporting to act for the defendants: there was nothing calling the attention of the plaintiffs to look to any one save the master or shipowners to perform that which is the *prima facie* duty of the master and shipowner, viz., to stow the goods safely. Under the circumstances I think that, that duty having been negligently discharged, especially where it was discharged in so palpably negligent a manner as that described in the defendants' letter of the 4th of December, it is clear that an action would lie against the shipowners, and that the shipowners would be estopped from relying upon a charterparty of which the plaintiffs had no notice, for any purpose: see per M. R., *Peek v. Larsen* (\*). The authorities and text-books are all uniformly to the effect that, subject to any stipulations to the contrary in the bills of lading, and in the absence of any notice of a charter, one of the primary duties of the master is to stow the goods carefully. This appears to me to be a duty arising upon the mere receipt of the goods for the purpose of car-

(1) 18 C. R. (N.S.) 90; 32 L. J. (C.P.)

(2) Br. & Lush., 4.

12.

(3) Law Rep., 2 Q. R., 86.

(4) 2 C. R. (N.S.) 134; 26 L. J. (C.P.),

209.

(5) Law Rep., 12 Eq., 378.



riage, and to be one which it would require an express contract to supersede or excuse.

Holding, however, as I do, that the bill of lading is binding between the parties as having been actually signed with the authority of the defendants, it becomes necessary to consider another point made by the defendants, viz., that by the terms of the bill of lading itself they are exempt from liability for the damage in question.

This turns upon the true construction of the exceptive clause in the bill of lading, the material parts of which are as follows: "The act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry, and collision, fire on board or on shore, and all accidents, loss, and damage of whatsoever nature or kind, and howsoever occasioned, from machinery, boilers, steam and steam navigation, or from perils of the seas or rivers, *or from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship*; the owners of the ship being in no way liable for any of the consequences of the causes above excepted; and it being agreed *that the captain, officers, and crew \*of the vessel in the transmission of* [417 *the goods, as between the shipper, owner, or consignee thereof and the ship and shipowner, be considered the servants of such shipper, owner, or consignee.*"

The defendants in their statement of defence set out the above clause, and alleged that, if the goods were not delivered in good condition, it was owing to "the acts, neglects, or defaults of the pilot, master, or mariners *in navigating the ship*." It was contended for the defendants that the word "transmission" in the above clause was never more extensive than the word "navigating," and that it included everything to be done with the goods from the receipt of them from the hands of the consignor to their arrival at their destination: and *Good v. London Steamship Owners Association* <sup>(1)</sup> was relied on, in which it was held that an injury which happened to a ship moored at a quay where she was lying, having put back to coal, and which injury was owing to the negligent leaving open of a sea-cock, was "damage caused by reason of improper navigation," within the meaning of a deed by which an association of shipowners agreed to indemnify each other against "loss or damage which by reason of the improper navigation of any such ship may be caused to any goods on board." In that case Willes, J., said <sup>(2)</sup>: "Improper navigation, within the meaning of this deed, is, something im-

<sup>(1)</sup> Law Rep., 6 C. P., 563.

30 ENG. REP.

<sup>(2)</sup> At p. 569.

1878

Hayn v. Culliford.

properly done . . . . in the course of the voyage." I do not think that the case assists the decision of that before me, beyond being an authority for the proposition that the ship need not be in a state of motion in order to be in a state of navigation, within the meaning of that word as used in the deed there in question. Other cases have decided that the word "navigation" for some purposes includes a period when the ship is not in motion; as, for instance, when she is at anchor. But I do not think that these cases have any strong bearing upon the question how the words "navigating the ship," and "transmission of the goods," ought to be construed in a clause such as the present.

The contention for the plaintiffs was, that the words "in transmission of the goods," if operative at all, had a limiting effect upon the alleged generality of the previous words, and confined their application to a period subsequent to the 418] period at which \*locomotion in the ship should commence; and they cited *Czech v. General Navigation Co.* (1) as showing that the tendency of the courts was strong to require clear affirmative proof on the part of the shipowner to enable him to claim exemption under exceptive clauses such as the present, and also the case of *Taylor v. Liverpool and Great Western Steam Co.* (2), in which Lush, J., uses this expression: "The word is ambiguous, and, being of doubtful meaning, it must receive such a construction as is most in favor of the shipper, and not such as is most in favor of the shipowner, for whose benefit the exceptions are framed." I am of opinion that the contention of the plaintiffs on this point ought to prevail. Though it may be quite correct to say that, for many purposes, negligent stowage is a portion of negligent navigation, and though in the case of *Good v. London Steamship Owners Association* (3), in answer to an observation of counsel, "Would damage arising from negligent stowage be within this deed?" Willes, J., answered, "Certainly; unless in a port where stevedores are employed" I do not think it follows that, in the case of an exceptive clause such as that now in question, the words "in navigating the ship," or "in transmission of the goods," include "stowage." On the contrary, I think that, applying the principle laid down by Lush, J., in *Taylor v. Liverpool and Great Western Steam Co.*, mentioned above, which I think ought to be applied in such cases, and considering how easy it would have been to use apt words to exempt the shipowners from liability for

(1) Law Rep., 3 C. P., 14. (2) Law Rep., 9 Q. B., 546, 549; 10 Eng. R., 172.

(3) Law Rep. 6 C. P., at p. 569.

improper stowage, it is more reasonable to hold that the case of negligent stowage is not included under the words relied upon than that it is included.

I therefore think that the plaintiffs are entitled to judgment for the sum assessed by the jury—£501 6s.—and I give judgment accordingly for that amount and costs.

*Judgment for plaintiffs.*

Solicitors for plaintiffs: *W. A. Crump & Son.*

Solicitors for defendants: *Hollams, Son & Coward.*

[3 Common Pleas Division, 419.]

May 10, 1878.

\*CAUGHEY V. JAMES GORDON & Co.

[419

*Shipping—Charterparty—Primage.*

By a charterparty the charterer engaged to ship in Australia a full cargo for a port in England at a freight of 60s. per ton *in full*; ship paying all port charges, pilotages, and towages: the freight to be paid in cash on right delivery of cargo at port of discharge, less advances, exchange, and commission: the captain to sign bills of lading for cargo as presented, at any rate of freight required by charterer; but, should the total freight by bills of lading amount to less than the total chartered freight, the difference to be paid the master in cash before sailing.

The master (who was paid a fixed salary, "to include all charges and allowances,") signed a bill of lading for the whole cargo making the goods deliverable to "order or assigns, freight to be paid in cash at port of discharge, the rate of discharge, rate of freight, and other conditions as per charterparty, *with 5 per cent. primage in cash on delivery, as customary.*"

The cargo was received at the port of discharge by the defendants, the indorsees of the bill of lading, as agents of the charterer, and the freight paid:

*Held*, that the defendants were not liable for primage.

APPEAL from the County Court of Lancashire holden at Liverpool.

The action was brought to recover £49 18s. 1d. As regards £8, a claim for demurrage, the question was one purely of fact, and the judge decided in favor of the defendants. As to the balance, £41 18s. 1d., which was a claim for primage, the facts proved or admitted at the hearing were as follows:

The plaintiff is the master of the British ship *San Juan*: the defendants are a firm of merchants in Liverpool.

On the 28th of April, 1877, the *San Juan* was chartered at Melbourne by her owner, Mr. T. Riley, to Messrs. H. Wilke & Co., merchants at Port Adelaide. By the charterparty the ship was to proceed to Port M'Donnell, and there load from the charterers or their agents a full cargo of bark . . . . and proceed to either Falmouth or Cork for orders to proceed to a safe port in the United Kingdom, and there

deliver the same, as ordered by the charterers or their agents, on being paid freight 60s. per ton of 2,240 lbs. gross weight in full; ship paying all port charges, pilotages, and towages: the freight to be paid in cash on right and true delivery of cargo at port of discharge, less any advances 420] that may have \*been made. The captain to sign bills of lading for cargo as presented at any rate of freight required by charterers or their agents, without prejudice to the charterparty; but, should the total freight by bills of lading amount to less than total chartered freight, the difference to be paid to the master in cash before sailing.

7. The vessel proceeded to Port M'Donnell (her port of loading), where a cargo was duly loaded; and she proceeded on the chartered voyage on the 6th of June, 1877.

8. A bill of lading was tendered by the charterers to the plaintiff for signature, and was signed by him and given to the charterers before the ship sailed. By the bill of lading the goods were made deliverable at the port of discharge "unto order or his or their assigns, average as accustomed freight for the said goods to be paid in cash at port of discharge, at the rate of discharge, rate of freight, and other conditions as per charterparty, *with 5 per cent. prime in cash on delivery, as customary.*"

9. The San Juan was ordered to Liverpool, and, after her arrival there, the defendants presented to the ship's agents the bill of lading for the cargo, and obtained a delivery-order from the ship's agents, and thereupon the cargo was delivered to them.

The judge found as a fact which he inferred from the documents and circumstances that the contract between the parties was upon the terms contained in the bill of lading. The defendants contended and contend so far as may be necessary, that there was no evidence to justify this inference, and that the judge's finding was not in law justifiable.

10. The charterparty and also the bill of lading had been previously transmitted to the defendants. The bill of lading had been indorsed by the charterers in blank and sent to Messrs. D. & W. Murray, their London agents, who had handed it to Messrs. Devitt & Hett, Messrs. Murray's London brokers. Messrs. Devitt & Hett indorsed it to Messrs. Hett, Yarrow & Co., and they, as they were unable themselves to act in the matter, indorsed it to the defendants, who undertook to act for the charterers, as above mentioned. None of the parties to whom the bill of lading was indorsed aforesaid had any interest in the cargo other than as agents of the shippers, who were the charterers of the

vessel. The defendants took delivery of the cargo as agents of the charterers. There was \*no evidence that the [421 plaintiff had any knowledge at the time of such delivery that the defendants were acting as agents of the charterers, or that they had no interest in the cargo other than as such agents, or of the circumstances under which or purposes for which the several indorsements were made, or that the charterparty had been transmitted to the defendants as aforesaid.

11. The defendants upon the right delivery of the cargo duly paid the plaintiff the freight as per charterparty, after deducting £505 17s. 6d. in respect of the advances, with exchange and commission. The plaintiff further claimed from the defendants £41 18s. 1d. for primage, which the defendants refused to pay.

12. A ship-broker called by the defendants, deposed that the captain's salary now customarily includes all gratuities, such as primage, &c.

13. It was admitted, on the part of the plaintiff, that, by the terms of his agreement with the owner of the ship, the plaintiff as master received a fixed salary, which was to include all charges and allowances; and that, if he recovered the £41 18s. 1d., he would be obliged thereunder to pay over or account for the same to the owner. It was admitted, on the part of the defendants, that, if the plaintiff was entitled to primage, the amount to which he was so entitled was £41 18s. 1d.

14. Upon this state of facts, the plaintiff claimed payment of the primage upon the terms of the bill of lading. The defendants, on the other hand, contended that the contract which ascertained and governed the rights of the plaintiff as master and the defendants (taking delivery of cargo as agents or brokers for the charterers) was the charterparty; that, under the charterparty, they were not liable to pay the sum claimed as primage in addition to the chartered freight; that the charterparty expressly stipulated for a delivery of the cargo upon payment of freight at a certain rate "in full;" and that, having paid the freight as per charterparty, they were not bound by the bill of lading, as contended by the plaintiff, to pay the charge for primage.

15. The judge held that the plaintiff was entitled to the primage, and directed judgment to be entered for him for £41 18s. 1d.

\*The question for the opinion of the court was, [422 whether the plaintiff was entitled to recover the amount claimed for primage.

1878

Caughey v. Gordon.

*Cohen, Q.C. (J. C. Mathews with him)*, for the defendants: The defendants, who received the cargo as agents of the charterer, and not under the bill of lading, can only be liable to the extent to which the charterer himself would be liable, that is, to the extent of the stipulated freight. The master, having by his arrangement with his owners precluded himself from claiming primage on his own account, cannot sue for it on his owner's account, when the owner by his contract with the charterers is himself estopped from claiming it. In *Best v. Saunders* (1) there was no charterparty, and therefore the assignees of the bill of lading were held liable upon the stipulation contained therein. The document which governs the rights of the parties here is the charterparty, not the bill of lading. The master signed the bill of lading as agent of the charterer, not to fix his rights, but to enable him to transfer the goods.

[LORD COLERIDGE, C.J., referred to *Charleton v. Cotesworth* (2).]

There the owners had received the primage, and there was no contract between them and the master which disentitled the latter to claim it. In *Abbott on Shipping*, 11th ed., 361, it is laid down that, "if by the contract between the owner and the master, the master is not to receive primage, he can maintain no action for it." By the terms of this charterparty, the charterers or their agents are to have delivery of the cargo on payment of freight at 60s. per ton *in full*.

No counsel appeared for the plaintiff.

LORD COLERIDGE, C.J.: I am of opinion that the defendants are entitled to judgment. The charterparty in this case is silent as to primage: the owner therefore is not entitled to sue for it; neither can the master sue for primage on the charterparty. Can he, then, sue on the bill of lading? Upon the facts stated, we are to assume that by arrangement between the owner and the master, the latter is precluded from claiming primage; and yet this action is brought by 423] the master to recover that which he has expressly stipulated with his owner that he will not claim. I think, notwithstanding the terms of the bill of lading, he is not entitled to maintain it.

LOPES, J., concurred.

*Judgment for the defendants.*

Solicitors for defendants: *Burton, Yeates & Hart*, for Tyrer, Kenion & Tyrer, Liverpool.

(1) M. & M., 208; 3 M. & R., 4.

(2) R. & M., 175.

[3 Common Pleas Division, 423.]

June 7, 1878.

**JAMES SMITH & CO. V. THE WEST DERBY LOCAL BOARD.***Negligence—Construction of Public Works—Highway or Sewer Authorities—Notice of Action under Public Health Act (11 & 12 Vict. c. 63), s. 139.*

The defendants, who were both the highway and the sewer authorities of West Derby, employed a contractor to construct a pipe-sewer under a highway within their district. The contractor in laying the pipes dug a trench, which he afterwards filled in with earth, and the roadway was apparently made good. The work was done under the directions and to the satisfaction of the defendants' surveyor. Some months after it was finished, a subsidence of the soil in the trench took place without any assignable cause, leaving the road apparently sound. The plaintiffs' horse, in consequence of the surface giving way, fell into the trench, and was injured:

*Held*, that there was evidence that the work of filling in the trench had been negligently and improperly done, and that the defendants,—either as the sewer or the highway authority, or as both,—were responsible.

The notice of action (under 11 & 12 Vict. c. 63), s. 139, stated that the plaintiffs intended to enter a plaint against the defendants for the injury and damage caused to them through the defendants by matters or things done or omitted by them and their laborers and servants, &c., to wit, that they did, by themselves, their laborers and servants, "negligently, carelessly, and improperly leave a certain portion of the highway in an insufficient and improper state of repair, whereby," &c.:

*Held*, that this was a sufficient intimation to the defendants that they were to be charged with an act of misfeasance, and not merely with a neglect of duty to repair the road.

**APPEAL from the County Court of Lancashire holden at Liverpool.**

This was an action for damage alleged to have been sustained by the plaintiffs by reason of the defendants having negligently, carelessly, and improperly left a road or highway which they were bound to maintain and repair, in an insufficient and improper state, whereby the plaintiffs' horse sustained injury.

\*The accident happened on the 13th of May, 1875, [424 the following notice of action was given on the 11th of October, and the action commenced on the 13th of November in the same year:

"Take notice that we (the plaintiffs) will, on the expiration of one month from this date, enter a plaint against you, the said local board of health of West Derby, in the county court of Lancashire holden at Liverpool, for the injury and damage caused to us by the undermentioned matters and things done or omitted by you and your laborers, servants, and others acting under your orders and directions, at and upon a certain road or highway called Moss Road, in the parish of West Derby, to wit, for that you the said local board of health did, by yourselves, your laborers, servants, and others, on or about the 13th day of May last, negligently,

1878

Smith v. West Derby Local Board.

carelessly, and improperly leave a certain portion of the said road or highway in an insufficient and improper state of repair, whereby a horse belonging to us, while being lawfully driven upon and along the said road or highway, sank into the said road or highway and was thrown therein, and by reason of the said negligent, careless, or improper conduct, was thrown down and severely injured and permanently diminished in value: and further take notice that T. G., of, &c., is the name of our attorney in the cause of action aforesaid."

The facts were as follows: By contract dated the 9th of March, 1874, the defendants engaged a contractor to lay down in the road in question (which it was admitted was a road vested in the defendants) a sewer. The sewer was to be a pipe-sewer; and the depth of the trench at the place where the accident occurred was to be about ten feet. The contractor was to excavate, to lay the sewer, and to fill up the trench,—all this under the directions and to the satisfaction of the defendants' engineer. The work was to be completed in three months, that is to say, before the 9th of June, 1874. The contractor was to be responsible for any damage to persons or property that might arise "from the execution of the works," and was to maintain the works, and also such part of the roadway as had been disturbed, in good order and repair for three months after completion.

The work during its progress, the excavation, the laying of the sewer, the filling up, and the restoration of the road, was carefully and daily inspected by the defendants' engineer or by their surveyor of roads and sewers, and everything was done to their satisfaction. The work was completed in May, 1874, and the traffic was then turned on. Some little subsidence took place here and there from time to time; but this was attended to either by the contractor or (at his expense) by the defendants.

After the lapse of about three months, that is to say, just 425] before \*the work was to be taken off the contractor's hands, the metalling of the trench was completed by leveling the road and putting on the macadam. This was done either by the contractor or by the defendants at his expense; and it was done under the inspection of the defendants' surveyor of roads and sewers, and to his satisfaction. The traffic was then turned on again. On the expiration of the three months, or soon after, that is to say, in August or September, 1874, the work (which still continued in a satisfactory state) was transferred to the defendants.



The defendants' surveyor continued to inspect or to pass over the road up to the time of the accident: and it was given in evidence that there was nothing a few hours previously to the accident to indicate that there was any defect whatever at the spot in question, that no intimation was received of anything of the kind, and that, so far as the surveyor was aware, no accident had taken place there or near there either previously to the accident in question or since. There was on that road a considerable amount of traffic. Since the transfer above mentioned the road had been from time to time repaired by the addition of a little granite: but in other respects it had not been disturbed in any way.

On the 13th of May, 1875, the plaintiffs' horse, drawing a spring-cart, was going along the road in question, when its fore feet suddenly sank through a coating or crust of macadam into a cavity, and the horse stumbled forward and was hurt. On examining the cavity it was found to be about twelve or fifteen inches deep. How the subsidence was caused is not known. Neither the engineer nor the surveyor could account for it. The former stated that possibly it might have been caused by the floods which had occurred about the time of the accident, and that such floods would affect more or less any foundation of rock and earth that had once been disturbed; and this even after the lapse of a considerable time. Both the engineer and surveyor were asked whether it could have been caused by any leakage in the sewer; and both (they having made careful examination with the view of ascertaining whether that was the cause) gave decided evidence that it could not, and that the sewer was in perfect condition at the time of the accident, and had been so ever since.

\*It was contended for the plaintiff that the defendants were liable either as the highway authority or as the sewer authority, the act complained of amounting to more than a mere nonfeasance. For the defendants it was contended that they could not be liable as the sewer authority, they having been guilty of no negligence, and the act complained of being at most a mere nonfeasance; that, if liable at all, it could only be as the highway authority, and the act being, if anything, merely a nonfeasance and not a misfeasance, they were not liable in that capacity: *Gibson v. Mayor of Preston* <sup>(1)</sup>, and the cases there cited, and *White v. Hindley Local Board* <sup>(2)</sup>, were relied upon.

<sup>(1)</sup> Law Rep., 5 Q. B., 218.

<sup>(2)</sup> Law Rep., 10 Q. B., 219,

1878

Smith v. West Derby Local Board.

Judgment was given for the plaintiffs, the damages being assessed at £10, and leave was given to appeal.

The questions for the opinion of the court (who were to draw inferences of fact) were,—1. Are the defendants liable in this action as the sewer authority?—2. Are they liable as the highway authority?—3. Are they liable on any other ground?

*Baylis*, Q.C., for the defendants: The mere suffering a highway to get out of repair affords no ground of action: the proper remedy is by indictment: *Gibson v. Mayor of Preston* <sup>(1)</sup>; *Parsons v. St. Matthew, Bethnal Green* <sup>(2)</sup>. In *White v. Hindley Local Board of Health* <sup>(3)</sup>, where the defendants, as owners of the sewer, were held liable for suffering a grid or grating which formed part of the sewer to be out of repair, the ground of the decision was that the sewer was vested in the local board, and they were charged with the duty of seeing that the appurtenances of the sewer were not dangerous. Secondly, the notice of action does not point to an act of misfeasance. The 11 & 12 Vict. c. 63, s. 139, requires a notice of action "clearly and explicitly stating the cause of action," and provides that, upon the trial of the action, "the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice." The object of the enactment is that the defendants shall have distinct notice of that with which they are charged, in order to enable them to ascertain the nature and extent of their liability, and so may tender amends. This notice points only to non-repair, and therefore discloses no cause of action: *Pendlebury v. Greenhalgh* <sup>(4)</sup>; *Jones v. Nicholls* <sup>(5)</sup>. The conclusion the judge came to was not warranted by the evidence. [*Gray v. Pullen* <sup>(6)</sup> was also referred to.]

*Cave*, Q.C., for the plaintiffs: The point as to the sufficiency of the notice of action is disposed of by *Jones v. Bird* <sup>(7)</sup>. Here, the notice sufficiently calls the attention of the defendants to the matter which is charged against them, viz., that they left the road insufficiently repaired after the digging of the trench. [He was then stopped.]

GROVE, J.: I am of opinion that the judgment of the county court judge was right. The first question we are asked is, are the defendants liable in this action as the sewer authority? Upon that question the learned judge gave the

<sup>(1)</sup> Law Rep., 5 Q. B., 218.

<sup>(2)</sup> Law Rep., 3 C. P., 56.

<sup>(3)</sup> Law Rep., 10 Q. B., 219.

<sup>(4)</sup> 1 Q. B. D., 36; 15 Eng. R., 171.

<sup>(5)</sup> 13 M. & W., 361.

<sup>(6)</sup> 5 B. & S., 970.

<sup>(7)</sup> 5 B. & A., 887.

judgment which I am inclined to give, viz., that they are liable as the sewer authority. In order to construct the sewer, it was essential that a trench should be dug; and it was their duty to see that it was done in a proper manner, and properly filled in when the sewer was laid. I think they are liable also as the highway authority. They are the persons whose duty it is in that capacity by statute to repair the highway and to keep it in repair. At all events, I should say they are liable in the double capacity of sewer and highway authority. With regard to the objection to the notice of action, which was Mr. Baylis's strongest point, I am of opinion that the notice is sufficient. The test I suggested has, it seems, been already applied by more than one learned judge. The notice is not required to be framed with the strict formality of a pleading. Its object is totally different. A pleading is a complaint of some matter which is a breach of the law, to which the party complained against may plead by way of traverse or confession and avoidance, so that there may be an issue properly framed. But the object of the notice of action is to enable the party complained against to see if there is any ground of action, so as to have an opportunity of tendering amends. All that is required is, that it shall be \*sufficiently clear and [428 explicit to show the ground of complaint,—the cause of action. That must not be left in doubt, or so framed as to mislead. In *Jones v. Bird* (\*), Abbott, C.J., says: "I think the notice ought not to be construed with great strictness, its object being merely to inform the defendants substantially of the ground of complaint, but not of the mode or manner in which the injury has been sustained." And in *Jones v. Nicholls* (\*), Pollock, C.B., says substantially the same.

Now, does this notice convey a sufficient intimation as to what is the cause of action? It is said that it is a mere notice of non-repair, in the sense of allowing the road to become foundrous by the ordinary effect of time and wear, as in *Parsons v. St. Matthew, Bethnal Green* (\*), and does not direct the defendants' attention to a charge of misfeasance. It seems to me that fairly and reasonably read, and with a mind willing to understand what was meant, it does convey the ground of complaint relied on by the plaintiffs, viz., that the defendants by their laborers and servants left the trench in an improper state, thus showing a sufficient cause of action: *Gray v. Pullen* (\*). It was further contended on

(\*) 5 B. &amp; A., 837, 844.

(\*) 13 M. &amp; W., 361.

(\*) Law Rep., 8 C. P., 56.

(\*) 5 B. &amp; S., 970.

1878

Smith v. West Derby Local Board.

the part of the defendants that there was no reasonable evidence to warrant the judge in finding the defendants guilty of negligence. We cannot go into the quantum of evidence: but I think there were facts from which negligence might and ought to have been inferred. The trench was so improperly filled in that a subsidence of from twelve to fifteen inches took place,—a thing not likely to occur by fair wear and tear, if the earth had been properly consolidated. Upon the evidence I should have come to the same conclusion that the judge arrived at. The appeal must be dismissed, with costs.

LINDLEY, J.: I am of the same opinion. The real ground of appeal in this case is the special demurrer to the notice of action. It certainly is possible to read the notice as pointing to non-repair only: but, reading it with reference to the circumstances, I think it fairly conveys to the minds of the defendants what is the negligence with which they 429] are charged. Our attention has been called \*to the language of 11 & 12 Vict. c. 63, s. 139, which requires that the notice shall “clearly and explicitly” state the cause of action. Now, the notice is that the plaintiffs intend to enter a plaint against the defendants for the injury and damage caused to them through the defendants, by matters and things done or omitted by them and their laborers and servants; and it goes on to explain that by saying “negligently, carelessly, and improperly leaving a certain portion of the road or highway in an insufficient and improper state of repair.” It appears to me that that is fairly capable of being read so as to extend beyond a mere suffering the road to become out of repair. It is impossible to say that the defendants were not given a proper opportunity of preparing their defence or tendering amends.

*Appeal dismissed.*

Solicitors for plaintiffs: *Stocken & Jupp*, for Radcliffe & Layton, Liverpool.

Solicitors for defendants: *Hedges & Brandreth*, for Thomas Goffey, Liverpool.

[3 Common Pleas Division, 429.]

July 8, 1878.

THE LONDON AND BRIGHTON RAILWAY COMPANY V.  
WATSON.

*Railway Company—By-law, Reasonableness of—Passenger travelling without a Ticket—  
Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 103, 109.*

A by-law of a railway company provided that "any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket" to any duly authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey."

*Held*, that, as against a passenger who had, in good faith, travelled a short distance upon the line without having procured a ticket, this by-law was unreasonable, and void,—inasmuch as it was in substance an attempt to inflict a penalty for doing without fraud that which, by the joint operation of ss. 103 and 109 of 8 Vict. c. 20, can be punished only if done fraudulently.

APPEAL from the County Court of Surrey holden at Southwark.

1. Action by the plaintiff company against the defendant for the balance of a railway fare from New Croydon to Lower Norwood, two stations on the railway of the plaintiff company.

\*2. On the 5th of April, 1877, the defendant arrived [430 at the Lower Norwood station by a train which had originally started from New Croydon station. On being asked by the ticket collector of the plaintiff company for his ticket, he stated, as the fact was, that he had joined the train at Norwood Junction (which is a station of the plaintiff company intermediate between the New Croydon and Lower Norwood stations), and had not had time to get a ticket, as he should otherwise have done, and that he had travelled second-class. The second-class fare from New Croydon station to the Lower Norwood station, viz., 8*d.*, was demanded. This the defendant refused to pay, but offered to pay the second-class fare from the Norwood Junction station to the Lower Norwood station, which was refused by the ticket collector. The second-class fare from the Norwood Junction station to the Lower Norwood station was at that time 7*d.*

3. When written to by the accountant of the plaintiff company, the defendant sent 5*d.* in stamps as and being 6*d.*, the second-class fare (as he supposed) between the Norwood Junction station and Lower Norwood station, less 1*d.* for the postage of his letter. The defendant, on being informed that the second class fare between the Norwood Junction

station and the Lower Norwood station was 7*d.*, paid to the plaintiff company another 1*d.*, making in all 6*d.* The balance sued for was the difference between the sum of 6*d.* so paid by the defendant to the plaintiff company, and the sum of 8*d.*, the second-class fare between the New Croydon station and the Lower Norwood station.

4. Passengers on the railway of the plaintiff company travelling from the New Croydon station to the Lower Norwood station were not at the time above referred to (except on special examination of tickets) asked to show their tickets to the officials of the plaintiff company between the said stations, and trains did not stop between the New Croydon station and the Norwood Junction station, there being no intermediate station between those two stations.

5. The plaintiff company had at the same time duly made and published, under the various statutes relating to their railway, by-laws for the regulation of the said railway, of which the following is one,—

“By-law No. 1. No passenger will be allowed to enter 431] any \*carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly authorized servant of the company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey.”

The deputy judge gave judgment for the plaintiff company for £1.

The question for the opinion of the court was whether judgment should not have been given for the plaintiff company for the full amount claimed by them, under the above circumstances.

May 10. *Jenne*, for the plaintiffs: The judgment of the county court judge was wrong. There is nothing unreasonable or repugnant to law in the by-law in question, which has received the sanction of the Board of Trade.

[LORD COLERIDGE, C.J.: Is it not imposing a penalty upon one who it is admitted has been guilty of no fraud? Suppose a man travels by the Great Western Railway from Slough to London simply without a ticket, is not the excess

between the fare from Slough and the place from which the train originally started a penalty?]

Having no means of ascertaining where the passenger joined the train, the only way in which the company can protect themselves against fraud is to require him to pay for the whole journey. Is the ticket collector to take the mere word of a stranger, when he has no means of investigating the truth of his statement? The judgment of Rolfe, B., in *Chilton v. Croydon Ry. Co.* <sup>(1)</sup> puts the reasonableness of this by-law upon the right ground.

[LORD COLERIDGE, C.J.: All that the court there meant to say was, not that the excess fare was not a penalty, but that it was not a penalty under s. 103 of the Railways Clauses Consolidation \*Act, 1845 (8 Vict. c. 20). The [432 only question was, whether that section justified the arrest of the plaintiff. This is a mere penalty upon a passenger for having lost his ticket. The company is sufficiently protected against fraud by s. 103, which imposes a penalty of 40s. upon one who travels on the railway "without having previously paid his fare, and with intent to avoid payment thereof;" or the company may protect itself by preventing persons from passing on to the platform who have no tickets.]

There is nothing in this by-law which is at all repugnant to any of the provisions of the Railways Clauses Consolidation Act, 1845. [The case of *Dearden v. Townsend* <sup>(2)</sup> was also cited.]

May 29. *Macmorran*, for the defendant, contended that this was, in truth, an attempt to impose a penalty upon a person who has been guilty of no offence, but who by mere carelessness or inadvertence may have omitted to obtain a ticket, or who, having obtained one, may have lost or been robbed of it in the course of a journey; and that therefore the by-law was unreasonable. He referred to *Calder and Hebble Navigation Co. v. Pulling* <sup>(3)</sup>, *Brown v. Great Eastern Ry. Co.* <sup>(4)</sup>, and *Bentham v. Hoyle* <sup>(5)</sup>.

*Jeune*, in reply.

*Cur. adv. vult.*

June 27. LORD COLERIDGE, C.J.: In this case the plaintiffs seek to reverse a judgment of the county court judge whereby he had held unreasonable the following by-law of the plaintiffs: [His Lordship read it.]

<sup>(1)</sup> 16 M. & W., 212.

<sup>(2)</sup> 14 M. & W., 76.

<sup>(3)</sup> Law Rep., 1 Q. B., 10.

<sup>(4)</sup> 2 Q. B. D., 406; 21 Eng. Rep., 185.

<sup>(5)</sup> 3 Q. B., 289; 28 Eng. Rep., 263.

The proceeding in the county court was, as it only could be, an action for the fare authorized by the by-law; and not a proceeding for a penalty under 8 Vict. c. 20, s. 103. There is no suggestion that the defendant wished to defraud the company. His perfect good faith is admitted. He was simply travelling on the company's line without a ticket; and the action was to enforce payment of a fare in excess of the fare for the distance he had travelled, on the ground that when he arrived at his destination he had no ticket. The sum originally in dispute was but 2*d.*; but the company 433] have thought it worth while to appeal, paying \*all the costs of the appeal whatever may be its result, on the ground of the great importance to them of the question raised by the case. The same reason led my Brother Lopes and myself to take time to consider our opinion; and, having fully considered the matter, I am of opinion that the county court judge was right in holding this by-law to be void.

I think it void on two grounds,—1. I think in substance it is an attempt to inflict a penalty for doing that without fraud, which, by the joint operation of the 103*d* and 109*th* sections of 8 Vict. c. 20, can be punished only if it is done with fraud. The principle of the decision in *Dearden v. Townsend* (1) appears to me to cover this case. It is true that, in that case, the by-law which was the subject of decision went beyond the by-law in this, because it proposed to punish the non-payment of the excess fare by a penalty not exceeding 40*s.*, and the proceeding was a proceeding before justices to enforce that penalty. The actual decision of the court was, that the company could not by a by-law make that an offence irrespective of fraud which the act of Parliament had expressly only made an offence with it; and that so to legislate would be repugnant to the act, which gave power to the company to legislate only in accordance with and subject to the act itself. But the judgments seem to me to show that all the judges of the Queen's Bench were not speaking with reference to the form of the procedure before them only, and that they would have thought this by-law equally inconsistent with and repugnant to the spirit of the act of Parliament, inasmuch as under it a perfectly honest person might be visited with highly penal consequences for an act sometimes, as railways are conducted, reasonable or even necessary,—at all events an act perfectly innocent, or at worst no more than careless. Moreover, if I rightly understand the reasoning of the Lord Chief Justice

(1) *Law Rep.*, 1 Q. B., 10.



in that case, he thought the by-law, even apart from the penalty, could only be held good if it was directed to the case of a wilful withholding of a ticket; and in this view my Brothers Mellor and Lush appear to have concurred. I think therefore this case is within the decision in the case of *Dearden v. Townsend* (<sup>1</sup>), with which case I entirely agree.

\*We were pressed with the expressions used by [434 the judges in the case of *Chilton v. London and Croydon Ry. Co.* (<sup>2</sup>). The case itself is not in point; not only because the question decided was the legality of an arrest to which the company had subjected the plaintiff in the endeavor to enforce payment from him of the extra fare; but because the acts of Parliament under discussion in that case were all passed long before 8 Vict. c. 20. But there are, no doubt, expressions attributed to Lords Wensleydale and Cranworth and Baron Alderson which appear to imply, not only that to inflict the whole of the fare upon a man who had travelled but a hundredth part of the whole distance would not be a penalty, but that it would or might be reasonable. If those very learned persons meant no more than that it was not a penalty in the technical sense of the word as used in the act before them, and could not be recovered by the proceedings before magistrates authorized by that act, no doubt all they said was perfectly correct. If they meant to say that it was not a highly penal law to inflict a payment of perhaps £5 upon a man who in perfect good faith had travelled no farther than would justify a payment of 5s., with all deference I cannot agree. I am glad to find that in this view I am confirmed by the opinions of the judges of the Queen's Bench in *Brown v. Great Eastern Ry. Co.* (<sup>3</sup>). I shall explain immediately why, if they said, as they hardly did, that such a law *was* reasonable, I venture also respectfully but entirely to differ.

But there is another ground, before we proceed to the question of reasonableness, on which, as I think, this by-law must be held to be void and illegal. I am not informed in this case, and even if I might import private knowledge into my judgment I do not possess it, what is the largest possible fare which this by-law would authorize to be exacted. But it is manifest that it might exact from a passenger a sum larger than the largest first-class fare which the act of Parliament authorizes the company to charge, for the whole distance *bona fide* traversed by the passenger from whom they seek to exact the excess. If, for instance, the

(<sup>1</sup>) Law Rep., 1 Q. B., 10.

(<sup>2</sup>) 16 M. & W., 212.

(<sup>3</sup>) 2 Q. B. D., 406; 21 Eng. R., 185.

1878

London and Brighton Railway Co. v. Watson.

passenger has travelled six miles, and the largest fare authorized by the act of Parliament is 3*d.* a mile, or 1*s.* 6*d.*, and the whole fare exacted from him is 10*s.*, or 15*s.*, or 20*s.*, 435] it is to my mind \*plain that the by-law is repugnant to the act of Parliament and bad within the 109th section already referred to. I assume, for the purpose of this holding only, that the fare is not a penalty, and that the passenger has no intention to defraud.

Secondly. The by-law appears to me to be bad equally upon the ground that it is unreasonable. It is manifestly unequal in its operation. A man who has travelled five miles or fifty may be mulcted in the same sum, without any reference either to the benefit he has derived from the company, or the injury he has inflicted on it. It is unjust; because it makes no distinction between a man who has really perpetrated, or attempted to perpetrate, a fraud upon the company, and one who has by mere inadvertence lost his ticket after having paid his full fare; or from whom it has been stolen; or who has carelessly but innocently neglected to provide himself with one. The penalty, so to call it, which may in some cases and to some persons be a very serious one, is inflicted without any regard to evidence or merits. Once paid, there is as far as I see no obligation on the company under the by-law to pay it back, even on the clearest proof that the ticket had been only temporarily mislaid, or had been bought and paid for and *bona fide* lost in any one of the numberless ways in which such an accident may happen to even the most careful railway traveller. Moreover, it imposes the fine altogether irrespective of any correlative duty in the company. No information is afforded by the case, and I possess none if I could use it, as to the facilities afforded by this company for the purchase of tickets. But judges cannot strip themselves of their ordinary knowledge. It is at least possible (numerous examples show that it is highly probable) that tickets are sold by it with an almost contemptuous disregard of the commonest convenience of the public. A single small hole, open often only just as the train is starting, round which hole a struggling and eager crowd congregate, so numerous and so hurried that decent comfort and inquiry are out of the question,—is the common facility, if facility it must be called, to which railway companies intrusted by Parliament with a carrying monopoly subject the long-suffering people of this country. No reason of common sense has ever been suggested, except that it might give the companies or their servants a little more trouble, why railway

\*tickets should not be sold all day long at the stations, or elsewhere than at the stations, like other tickets with which all of us are familiar. Yet a company which exposes an old man, or a weak man, or a woman, to the alternative of a sharp physical struggle to get a ticket, or the possible loss of the train, takes upon itself to mulct the same passenger in perhaps a highly penal sum, because he travels without that ticket which they have themselves denied him the common and decent facilities to procure. Whether this is so or not with the plaintiff company I do not know. There is certainly nothing to prevent such a working of their traffic, for it is unhappily too common in point of fact; and I think for these reasons this by-law is unreasonable and bad, as a by-law very much the same as this, though with the addition or alternative of a penalty, was held to be in a recent case before the Queen's Bench Division: *Bentham v. Hoyle* <sup>(1)</sup>.

I am not at all insensible to the considerations which were very ably pressed upon us by Mr. Jeune, as to the liability of the company to gross frauds at the hands of passengers, and the reasonable necessity for protecting them, as far as may be, from those frauds. That companies are often and seriously defrauded, I do not at all doubt; and I am sure that Parliament would not refuse to give them well-considered and fair powers of prevention or redress. Baron Alderson, in an interlocutory observation made in the case above cited <sup>(2)</sup>, so far back as the year 1847, suggested one check on fraud, which, if companies had a sufficiency of carriages and a sufficiency of servants, would seem to be effective enough. Lapse of time may have shown very likely that other means should be added to those which he suggested. But, at any rate, the interest of companies is not the only interest to be considered; and companies must not protect themselves by by-laws unfair and unreasonable against the consequences of their own inadequate, careless, and inconvenient system of working.

It has, indeed, been suggested that, as the 108th section of 8 Vict. c. 20 gives the company the power "to make regulations" for, *inter alia*, "generally regulating the travelling upon or using \*and working of the railway," [437 this by-law is within these words, and that therefore the company had authority to make it. But, first, the power given in the 108th section is limited by the words of the 109th. And by-laws made to enforce such regulations must not be

<sup>(1)</sup> 3 Q. B. D., 289; 28 Eng. R., 263.

<sup>(2)</sup> *Chillon v. London and Croydon Ry. Co.*, 16 M. & W., at p. 230.

repugnant to the general law, nor to the act itself. For the reasons already given, I think this by-law is repugnant to the act. And, next, I should be prepared, if necessary, to hold that the words of the 108th section do not apply to such a regulation as this; and that the words "regulating the travelling upon or using and working the railway" do not extend to such a by-law as this, but, fairly construed, must be limited to the ordering of the traffic itself and the physical use and working of the lines and stations of the company. It is not, however, necessary to decide this question; as upon other grounds I have arrived at the conclusion that the decision appealed from was correct, and that this appeal must be dismissed, and with costs.

LOPES, J.: Having had an opportunity of reading the judgment which my Lord has just pronounced, it is enough for me to say that I entirely concur in it.

*Judgment accordingly.*

Solicitors for plaintiffs: *Norton, Rose, Norton & Brewer.*  
Solicitor for defendant: *H. S. Smith.*

See 29 Eng. Rep., 394 note; 28 id., 794 note; Id., 268 note.

Where a railroad company issues a ticket entitling the holder to a passage over its own and connecting lines to the place of destination mentioned in the ticket, and there is no limitation in it upon the right of the holder to transfer it to another; held, that upon the refusal of a connecting line to accept the ticket, and of the contracting company to furnish a local ticket over that line, or the amount of money necessary to procure one, the holder has a right of action against the original contracting company for breach of contract; and this right is assignable, under the laws of the State of Colorado, so as to give a right of action to the assignee: *Hudson v. Kansas Pacific Ry. Co.*, 9 Fed. Repr., 879; 2 Colorado Law Reporter, 218.

A regulation by a railway company by which one who has paid his fare between two points on the road, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor and present it to the conductor of the train on which he seeks to complete his journey, as evidence of his right to do so without further payment, is a reasonable regulation.

If the passenger, in such a case, asks the proper conductor for a stop-over ticket, and through the conductor's fault receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and upon his refusal to pay it may eject him from the train at some usual stopping place, using no unnecessary force; and such ejection will be no ground of recovery against the company, though it will be liable to the passenger for the fault of the first conductor: *Yorton v. Milwaukee, etc.*, 11 North Western Repr., 482, Supreme Court, Wisc.

The statute of 1871, ch. 213, which declares that the holder of a railroad ticket shall have the right to stop over at any of the stations along the line of the road, and that his ticket shall be good for a passage for six years from the time it is first used, applies only to transportation within the territorial limits of this State; the statute has no force beyond the limits of the State, and consequently does not apply to a ticket from Portland to Montreal, while the ticket is being used beyond the limits of the State.

While such a ticket is being used in New Hampshire, Vermont, or Canada, the rights of the passenger will be gov-

Coxhead v. Mullis.

1878

erned and controlled by the laws of those places, and not by the laws of Maine; but in the absence of proof to the contrary, the laws of those places will be presumed to be the same as the

common law of Maine, and not the same as the statute above cited: *Carpenter v. Grand Trunk, etc.*, 72 Maine, 388.

[3 Common Pleas Division, 439.]

July 3, 1878.

\*COXHEAD V. MULLIS.

[439]

*Infancy—Promise of Marriage—Ratification—37 & 38 Vict. c. 62 (The Infants Relief Act, 1874), s. 2—Fresh Promise—Evidence of.*

The Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2, providing that "no action shall be brought whereby to charge any person upon . . . any ratification made after full age of any promise or contract made during infancy . . ." applies to promise of marriage.

The defendant, during his infancy, promised to marry the plaintiff, and, after coming of age, recognized without expressly repeating the promise, and eventually broke it.

The plaintiff sued him for the breach, and was nonsuited:

*Held*, that the nonsuit was right; for, assuming that there was a ratification of the promise subsequent to his majority, the right of action upon such ratification was taken away by the above section, and there was no evidence of any fresh promise made after the defendant came of age.

**ACTION** in the Lord Mayor's Court, for breach of an agreement to marry.

**Pleas:** 1. Denial of the agreement. 2. Infancy. 3. Release and exoneration.

**Replication:** 1. Issue. 2. That the defendant after he attained his majority ratified and confirmed the agreement. 3. Denial of the release.

At the trial, before the Recorder of London, the plaintiff proved courtship by the defendant, and, on the 14th of October, 1876, a formal offer of marriage from him, and an engagement between them. The defendant was then a minor. He came of full age on the 8th of March, 1877, and afterwards they continued on the same terms, but nothing definitely was said about marriage. She received affectionate letters from him. They visited each other, and walked out together frequently; differed and were reconciled. Finally, he became cold towards her, she complained, and on the 24th of September he broke off the engagement. The mother of the plaintiff corroborated her testimony, and some of the letters were put in evidence.

For the defence it was contended that the promise made during the infancy of the defendant was invalid, and could not be ratified after his majority, by reason of 37 & 38 Vict. c. 62, s. 2. Nonsuit, with leave to move.

440] \*A rule *nisi* having been obtained to set aside the nonsuit, and for a new trial on the grounds, first, that the contract was not a contract within 37 & 38 Vict. c. 62; secondly, that there was evidence to go to the jury of a contract on which defendant was liable.

June 26. *Sutton* showed cause: First, there was undoubtedly a promise of marriage made by the defendant during his infancy; but it did not bind him. He could not ratify it. "No action shall be brought whereby to charge any person upon . . . any ratification made after full age of any promise or contract made during infancy . . ." 37 & 38 Vict. c. 62, s. 2. That section applies to all contracts made by an infant, and a ratification after majority is rendered as void as a contract made during infancy: see *Ex parte Kibble, In re Onslow* ('). Secondly, the only promise made was that of the infant, and his amatory conduct after coming of age is merely evidence of a ratification of the promise made during infancy, and not evidence of any fresh promise.

*A. Cock*, in support of the rule: First, s. 1 defines the contracts rendered void by the act, viz., all contracts for the repayment of money, or for goods (other than necessities), and all accounts stated by an infant. And s. 2, although its terms are wide, was intended to invalidate the ratification of such contracts only. Secondly, there was evidence of a new implied contract made after the defendant attained his majority: *Cawthorne v. Cordrey* ('). That case arose under the 4th section of the Statute of Frauds, which provides that "no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof." On Sunday, the 23d of March, the plaintiff made a contract to serve the defendant from the 24th for a year, and entered upon the service on the 24th. The Court of Common Pleas held that there was evidence of a fresh agreement on the 24th.

[LORD COLERIDGE, C.J.: You say then that evidence of an agreement void in law may be evidence of another which is binding? But must not the evidence afforded by conduct of the defendant after he came of age be referred only to the definite promise made previously?]

441] \*It was some evidence of a renewed promise; whether it was sufficient to prove such promise was a question for the jury. Therefore the nonsuit should be set aside.

*Cur. adv. vult.*

(') Law Rep., 10 Ch., 573.

(') 13 C. B. (N.S.), 406; 32 L. J. (C.P.), 152.

July 3. LORD COLERIDGE, C.J.: This case raises an interesting question, whether the 37 & 38 Vict. c. 62, which is the Infants Relief Act, does or does not apply to the case of a breach of promise of marriage. The action is brought against a person of full age for the breach of a contract of marriage, which he undoubtedly had made when an infant. There had been various disputes between the parties, and finally the engagement was broken off after the defendant had become of full age. It was admitted that there had been no fresh contract or promise after the defendant came of age; or, at all events, there was no evidence of any such fresh promise. There had been a clear promise before, and there was abundant evidence of ratification, if ratification alone would do, after the defendant attained his majority. Before saying a word upon the question whether the act applies, I may observe that I am of opinion that, where there is a clear promise, such as was proved in this case—a promise to marry being in this respect like any other contract—ratification, if it exists, must have reference to the contract proved; and you cannot say, because there is a ratification from day to day, that there is a fresh promise from day to day. Evidence of ratification is one thing, evidence of a fresh promise is another; and, if there is positive proof that the promise was made before and the ratification after the defendant became of full age, supposing that the act applies to such a case, I am of opinion that the ratification would not be evidence of a fresh promise, but must be referred to the promise made before the defendant was of age.

It is admitted in this case that, if the act does not apply, there is abundant evidence to fix the defendant, supposing he had been sued under the old law; therefore the question simply arises upon the recent statute. Now, the act consists of two sections only. The 1st enacts that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be \*supplied [442 (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void." Then the 2d section enacts that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." The question is whether that does or does not apply

to a case of breach of promise of marriage. The words of the 2d section, I think, are quite sufficient to include such a promise. The argument was, that, as regards the 1st section, it is entirely confined to contracts entered into for the repayment of money and goods supplied or to be supplied; and that the first part of the second section confines itself entirely to promises made after full age to pay a debt contracted during infancy; and it is suggested that we ought to read the second part of the 2d section as if it ran thus: "or upon any ratification made after full age of any *such* promise or contract made during infancy."

I believe this is the first time this section has had to be considered with reference to this matter. I should have gladly deferred to any judicial authority which could have been presented as throwing light upon the subject; but, in the absence of any such authority, the tendency of my own mind, right or wrong, always is, to suppose that Parliament meant what Parliament has clearly said, and not to limit plain words in an act of Parliament by considerations of policy, if it be policy, as to which minds may differ, and as to which decisions may vary. We may thus make that which is a plain and simple enactment,—I will not say inoperative, but—doubtful or obscure, if considerations are to be introduced into the construction of it, when it is entirely uncertain whether they were present to the minds of the Legislature when the enactment was made. Looking at this section, I find the words change their form, and I cannot accede to the argument of the plaintiff's counsel, without putting a word into the statute, viz., "*such*," which Parliament has deliberately left out, and which I am not to assume that Parliament has carelessly left out, meaning that the judge should supply it. Therefore, upon the best consideration I 443] can give to the matter, I think this act of \*Parliament does apply to breaches of promise of marriage. It certainly is a matter which in my judgment comes within the fair contemplation of the law with regard to infants. I see nothing to limit the words of the act, and I hold, therefore, that the defendant is entitled to succeed.

My Brother Lopes had at first some doubts on the matter; but, before he left London for circuit, he authorized me to say that those doubts were removed. The judgment I have pronounced must therefore be taken to have the sanction and approval of my Brother Lopes.

*Judgment for the defendant.*

Solicitor for plaintiff: *R. Chapman.*

Solicitors for defendant: *Clarkson, Son & Greenwell.*



[3 Common Pleas Division, 443.]

Feb. 14, 1878.

[IN THE COURT OF APPEAL.]

## CUNNINGHAM v. DUNN and Another.

*Ship and Shipping—Charterparty—Foreign Government Refusing to Allow Ship to Load—Vis Major—"Dead Weight."*

By a charterparty it was agreed that the defendants' ship, the R., should, after loading "dead weight" at M., proceed to V., a Spanish port, and there load a cargo of fruit for the plaintiff. At the time of entering into the charterparty the plaintiff knew that the "dead weight" intended to be put on board the R. at M. would consist of military stores, and he knew that by the ordinary law of Spain a vessel with warlike stores on board would not be allowed to load at a Spanish port. Upon application being made to the Spanish Government to relax the prohibition, permission to load was refused. The R. arrived at V. with the warlike stores on board, but otherwise ready and fit to load the agreed cargo: she left immediately on learning that permission to load would not be granted:

*Held*, that the plaintiff could not sue the defendants for not having the R. ready to load, for, through the act of a superior power, the parties were unable to perform their respective duties under the contract, the plaintiff being unable to load the cargo, and the defendants to receive it.

*Ford v. Cotesworth* (Law Rep., 4 Q. B., 127; in Ex. Ch., 5 Q. B., 544,) followed.

## ACTION by charterer against shipowners.

By a charterparty dated the 8th of October, 1875, it was agreed between the defendants, Dunn & Raeburn, owners of the ship Rainton "now on her way to Genoa and Malta," and the plaintiff, that the ship should, "with all convenient speed after \*loading dead weight at Malta for owners' [444 benefit, sail and proceed to Messina, and one first-class Spanish port in the Mediterranean, or two first-class Spanish ports in merchant's option, or one Spanish port only (orders to be given at Malta twenty-four hours after steamer's arrival there, or so near thereto as she may safely get), and there load from the factors of the said affreighter, the remaining measurement space of light cargo only, including all descriptions of fruit; cargo not to exceed 400 tons, nor to be less than 301 tons, which the said affreighter binds himself to ship." The port of destination was "River Thames, London," and the charterparty contained the clause, "the act of God, the Queen's enemies, fire, and all and every other the dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted." The charterparty contained also provisions of the usual kind as to payment of freight, and as to the lay days, and as to lien for freight. In the margin of the charterparty the following memorandum was

1878

Cunningham v. Dunn.

written: "By 'first-class' is meant any port that a steamer with cargo from a foreign port can load at by Spanish law, without risk of detention by custom house authorities."

At the trial, which took place before Lord Coleridge, C.J., and a special jury, it appeared that the *Rainton*, upon her arrival at Malta, took on board military stores belonging to the British Government, as dead weight, pursuant to a contract previously entered into by the defendants; she afterwards sailed for Valencia to load, pursuant to the charterparty. On hearing that the *Rainton* had munitions of war on board, the plaintiff's agent at Valencia informed him that by the law of Spain the *Rainton* would not be allowed to load, and would be liable to confiscation. Thereupon an effort was made through the British Minister at Madrid, to induce the Spanish Government to permit the *Rainton* to load. This permission, however, could not be obtained, and the *Rainton* sailed for Gibraltar without loading, immediately after her arrival at Valencia. This was the breach of the charterparty complained of by the plaintiff. The cargo, which had been intended for her, was shipped by other vessels, and the plaintiff alleged that he had sustained damage by the breach to the extent of £351 9s. 8d.

In answer to questions left to them by the learned judge, 445] the \*jury found that when the charterparty was entered into, the plaintiff did know that the dead weight to be taken by the *Rainton* at Malta was military stores; and further, that he did know, when he ordered the ship to Valencia, that this circumstance would subject her to embargo, and would prevent the loading of other cargo; that the defendants became aware of the Spanish law, after the *Rainton* had gone to Malta.

Upon these findings, Lord Coleridge, C.J., gave judgment for the defendants.

The plaintiff appealed.

Feb. 13, 14. *Murphy*, Q.C., and *R. M. Bray*, for the plaintiff: Notwithstanding the findings of the jury, the judgment ought to be entered for the plaintiff. The question depends upon the construction of the charterparty, and particularly upon the meaning of the clause, "after loading dead weight at Malta for owners' benefit;" it is submitted that "dead weight" does not include military stores. In every charterparty an implied warranty is contained that the vessel shall be fit and ready at the port of loading to take on board the agreed cargo, *Stanton v. Richardson* (1); and

(1) *Law Rep.*, 9 C. P., 390; 10 Eng. R., 223.

by taking on board munitions of war, this implied warranty was broken. By their own acts the defendants disabled themselves from fulfilling their contract. The charterparty must be interpreted according to the language used therein, and the surrounding circumstances must not be considered. The defendants' counsel may rely upon *Ford v. Cotesworth* (<sup>1</sup>), but in that case the owner of the ship sued the charterer for delay in unloading her; here the plaintiff was altogether debarred from loading the agreed cargo. *Harris v. Dreesman* (<sup>2</sup>), so far as it is not an authority for the plaintiff, may be distinguished in like manner. By the charterparty, the defendants undertook to have their vessel ready to load at Valencia; and the case falls within the principle laid down in *Paradine v. Jane* (<sup>3</sup>), namely, that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided \*against it by his contract;" [446 and this principle was adopted and applied by the Court of Common Pleas in *Medeiros v. Hill* (<sup>4</sup>), where it was held that it was no defence to an action on a charterparty for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charterparty. The defendants were not prevented from performing their contract by any inevitable accident: the present case is unaffected by the decision in *Appleby v. Myers* (<sup>5</sup>). The defendants as ship-owners are liable for any act, which they were not allowed by the charterparty to commit, and which prevented them from fulfilling their contract. Moreover, even if the defendants could lawfully ship at Malta warlike stores, it became their duty to obtain the permission of the Spanish Government to load at Valencia (<sup>6</sup>).

*Cohen, Q.C.*, for the defendants: In the events which happened, neither party can sue the other for breach of contract. No warranty could be implied that the dead weight put on board the Rainton should allow her to load at Valencia. *Ford v. Cotesworth* (<sup>1</sup>) is in point, and is decisive for the defendants. Neither party was ready to perform the

(<sup>1</sup>) Law Rep., 4 Q. B., 127; in Ex. Ch., 5 Q. B., 544.

(<sup>2</sup>) 23 L. J. (Ex.), 210.

(<sup>3</sup>) Aleyn, 26, at p. 27.

(<sup>4</sup>) 8 Bing., 231.

(<sup>5</sup>) Law Rep., 2 C. P., 651.

(<sup>6</sup>) In the course of his argument Murphy, Q.C., stated that he was prepared

to contend that Valencia was a "first-class port" within the meaning of the memorandum written in the margin of the policy, but Cohen, Q.C., said that he should not for the defendants rely upon the words of that memorandum.

(<sup>1</sup>) Law Rep., 4 Q. B., 127; in Ex. Ch., 5 Q. B., 544.

1878

Cunningham v. Dunn.

contract at Valencia, because both were prevented from being ready.

*Murphy, Q.C.*, replied.

*BRAMWELL, L.J.*: I think that this judgment must be affirmed. I do not see any ground for blaming the conduct of the plaintiff in commencing these proceedings; upon the other hand it is a little hard upon the defendants that they should be sued in the present action, for the plaintiff was aware that he was running a risk, and that the Spanish Government might prevent the cargo from being put on board. I think that the defendants committed no default at Valencia. I think that this case is governed by the principle laid down in *Ford v. Cotesworth* ('); the plaintiff as charterer was willing to put a cargo on board, but a power 447] over which neither \*party had any control prevented the defendants, as shipowners, from receiving it. However, the counsel for the plaintiff contended that the charterparty contained an implied warranty that the ship should be presented to the plaintiff in such plight and condition that she might lawfully take on board the proffered cargo. I know of no authority supporting such a proposition. We have to construe the words, "now on her way to Genoa and Malta," and also "with all convenient speed after loading dead weight at Malta, for owners' benefit, sail and proceed to Messina, and one first-class Spanish port in the Mediterranean, or two first-class Spanish ports in merchant's option, or one Spanish port only." The object of these words was probably to show, that the ship was not to go to Valencia direct, but they also show that she was proceeding to Malta for dead weight, and there is no restriction as to what the dead weight is to be. The fair construction is that she might take on board any kind of dead weight, and that there was no general warranty that it should be such as the Spanish Government should deem lawful. It has been further contended, that even if there was no warranty, at all events a shipowner ought not to disable himself from performing his part of the contract. I think that great weight may be attached to that argument; nevertheless, as it seems to me, it ought not to prevail, for the defendants or their agents do not seem to have known that there was a real impediment; they appear to have believed that the prohibition would not be persisted in. It has been argued that they ought not to have risked a refusal of the permission to load; as to this I am not clear, for the charterparty does not in express terms forbid the taking on board of mil-

(<sup>1</sup>) Law Rep., 4 Q. B., 127; in Ex. Ch., 5 Q. B., 544.

itary stores; but, at all events, the defendants may say that if the plaintiff might have lawfully objected to the loading of government stores, he gave them a license to do so; that license was a continuing license. The plaintiff knew what the defendants' ship had on board, and yet allowed her to sail, in fact sent her, to Valencia. My judgment is for the defendants, and the grounds of it are, first, that there was at Valencia a joint inability to perform the charterparty, and not a refusal by the defendants so to do; secondly, that there was no warranty that the dead weight should be such as to allow the vessel to be loaded; thirdly, that if the defendants were bound not \*to disable themselves from [448 taking on board the plaintiff's cargo, they did not know at the time of entering into the charterparty that they would so disable themselves; and, fourthly, that the plaintiff gave the defendants license to sail to Valencia with the military stores on board.

BRETT, L.J.: Under a charterparty in the ordinary form, the shipowner is bound to have his ship in proper condition for loading at the port within the time specified; and if he is prevented by any unforeseen cause from fulfilling his engagement, he is liable to pay damages for the breach of his contract. The charterer is bound to have the cargo ready to be put on board within a stipulated time, and if any unforeseen casualty arises whereby he becomes unable to load according to his undertaking, that misfortune is his misfortune and he is liable to compensate the shipowner. In this case *prima facie* the defendants, as shipowners, were bound to have the Rainton ready to be loaded at Valencia, and the plaintiff, as charterer, was bound to have the cargo ready to be put on board at that port. But the question arises, how far the ordinary rule is varied by the special circumstances of this case. At the time of entering into the charterparty the ship was on her way to Genoa and Malta, and by its terms she was to proceed to Messina and a Spanish port, or Spanish ports only, as the plaintiff might direct. A somewhat unusual stipulation is inserted as to loading dead weight at Malta for the owners' benefit. In my view, we are at liberty to refer to the evidence of the existing facts for the purpose of showing what were the circumstances as to which the parties were negotiating. It was intended that the Rainton should load at Malta military stores, and the evidence shows, and the jury have found, that the plaintiff was aware of this intention. The plaintiff and the defendants were negotiating with reference to this state of facts, and it was known to the plaintiff that "dead weight" did

1878

Cunningham v. Dunn.

include military stores; and as it seems to me, the reference to the voyage to Genoa and Malta was introduced for the purpose of calling attention to the fact, that she was to load the dead weight before she proceeded upon the chartered voyage. We may receive this evidence as to the force of the words "dead weight;" it does not contradict the charter-449] party, \*but it explains it; and it is therefore admissible upon the principle acted upon in *Macdonald v. Longbottom* (\*). In my opinion, the result of the evidence is that it was agreed that the defendants might take on board at Malta military stores as dead weight, and that after loading them the ship should proceed to Valencia. When she reached that port, in all respects but one, she was ready to load such a cargo as was mentioned in the charterparty; the defendants had done nothing inconsistent with their contract, and had done only what they were entitled to do. But by reason of Spanish law, and of the refusal of the Spanish Government to mitigate it, the defendants were not ready to load, but also the plaintiff was not ready to put the cargo on board: the law of Spain prevented the parties from performing what they had respectively undertaken to do. *Ford v. Cotesworth* (†) is in point, and seems to me to decide this case; it establishes that where neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other. For these reasons I think that the judgment of Lord Coleridge ought to be affirmed.

COTTON, L.J.: When the defendants' ship reached Valencia, so far as the purposes of navigation were concerned, she was ready to receive the agreed cargo, but she was prevented from loading it because she had on board military stores. We may assume that the plaintiff had provided a cargo; but both parties were prevented from performing their respective undertakings by the prohibition of the Spanish Government. Under these circumstances, we must look at the contract entered into between them. Of course, parol evidence must not be allowed to give to the written words a meaning which otherwise they would not bear; but we may and must learn what the facts were for the purpose of construing it aright. Both parties knew that the vessel was upon her way to Malta: the plaintiff knew that the permission to load might be refused after taking on board military stores. All that the shipowners have done has been done in accordance with the terms of the contract. The

(\*) 1 E. & E., 977; 28 L. J. (Q.B.), 293; in Ex. Ch., 1 E. & E., 987; 29 (L. J. (Q.B.)), 256.

(†) Law Rep., 4 Q. B., 127; 5 Q. B., 544.

charterer cannot say that the ship has not been loaded through the default of her owners: the \*act of the [450 Spanish Government has prevented the contract between the parties from being carried out.

*Judgment affirmed.*

Solicitors for plaintiff: *Lowless & Co.*

Solicitors for defendants: *Miller & Smith.*

---

[3 Common Pleas Division, 450.]

May 1, 8, 1878.

[IN THE COURT OF APPEAL.]

PERCY ATTENBOROUGH V. THE LONDON AND ST.  
KATHARINE'S DOCK COMPANY.

ROBERT ATTENBOROUGH V. THE SAME.

*Interpleader—Indorsee of Dock Warrant—1 & 2 Wm. 4, s. 58, s. 1—Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 12—Different Liabilities—Damages for Detention—Contract for Sale of Goods induced by Fraud—Property in Goods obtained by Fraud.*

S. was the agent of L., a wine merchant in Spain, and was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, and sent the bills of lading to S.: the bills of lading were handed by S. to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with the defendants, a dock company, who issued warrants for the same: some of the wine therein mentioned was made deliverable to the order of one of the three persons, and the rest to the order of another of them. The warrants were then pledged with the plaintiffs to secure advances. L. afterwards served notice upon the defendants not to part with the wine: thereupon the defendants refused to give up the wine when it was demanded of them by the plaintiffs, who commenced actions claiming damages in addition to the value of the wines:

*Held*, reversing the decision of the High Court of Justice, that the defendants were entitled to an interpleader order under 1 & 2 Wm. 4, c. 58, s. 1, and the Common Law Procedure Act, 1860, s. 12, for the right to the wine might be determined as between the plaintiffs and L., and the actions might be stayed as to that, and might be continued as to the claims for damages, and by issuing the dock warrants the defendants had not debarred themselves from obtaining relief under those statutes.

*Cravenhay v. Thornton* (2 My. & Cr., 1,) discussed.

*Held*, also, that as the wine had been obtained by fraud from S., the agent of L., with a power to sell, the property in it passed to the three persons, who before the fraudulent contract was annulled could confer a title upon the plaintiffs, and that L. must be barred upon the plaintiffs undertaking to account to him for the value of the wine after deducting their advances.

APPEAL by the defendants against the decision of the High Court of Justice affirming the dismissal by Field, J., of a \*summons under the Interpleader Acts (\*). The [451

(\*) *Ante*, p. 236.

1878

Attenborough v. St. Katharine's Dock Co.

following were the facts appearing in this court at the hearing upon the 1st of May :

In the action commenced by Percy Attenborough, it appeared that about the 7th of June, 1877, thirteen butts of wine, brought by the Gibraltar from Cadiz, were entered by C. J. Dolaro for warehousing at the Custom House, London, and about the same time seven of them were received by the defendants. About the 12th of June the defendants issued seven warrants (one for each butt), making the wine deliverable to C. J. Dolaro, or by indorsement to his assigns: upon the 20th of June, five of these seven warrants were pledged with the plaintiff by one Cohen, as security for an advance of £55 and interest, and on the 27th of August the remaining two of the seven warrants were pledged with the plaintiff to secure an advance of £14: the warrants had been indorsed by C. J. Dolaro. The plaintiff was to sell the wine to cover his advances if they were not repaid within three months.

In the action commenced by Robert Attenborough, it appeared that in June, 1877, certain other wines were received by the defendants upon being landed from the Gibraltar in which they were imported. The defendants in the course of that month issued warrants in respect of these wines: by all the warrants (except one) the wine thereby represented was made deliverable to W. Schultz, or by indorsement to his assigns: by the remaining warrant the wine thereby represented was made deliverable to C. J. Dolaro, or by indorsement to his assigns. In the months of July and September these warrants were pledged with the plaintiff, Robert Attenborough, for advances of money upon the security thereof. The plaintiff was to sell the wine to repay himself the advances if they were not repaid within three months.

At the end of October the defendants received notice in writing from E. D. Lewis, the solicitor for Diego Lopez, of Zerez de la Fontera, that the wine mentioned in all the warrants above referred to had been obtained from his client by fraud, and he requested them not to part with the wine. In the month of February, 1878, the plaintiffs produced the warrants held by them respectively to the defendants, and 452] demanded that the wines should be given up to them; they at the same time tendered the amount of the dock-rent, rates and charges. The defendants, however, refused to give up the wines, and thereupon the present actions were commenced; the plaintiff, Percy Attenborough, alleged that he had sold the wines represented by the war-



rants held by him, and that he was liable to pay damages to the purchasers thereof. The defendants claimed no interest in the wines other than the usual dock-rent, rates and charges, payable in respect of them. The defendants having taken out an interpleader summons, it was dismissed by Field, J., as above mentioned. Prior to the hearing in this court upon the 1st of May, no affidavit was produced in support of the claim of Lopez: an affidavit sworn on the morning of that day by E. D. Lewis, his solicitor, was then produced and read to the court: it alleged that the documents relating to the wine had been obtained from Lopez by fraud; the court, however, intimated that further evidence of a more definite nature must be procured.

May 1. *Watkin Williams* Q.C. (*Wood Hill*, with him), for the defendants in each action in support of the appeal. In the High Court of Justice, Lord Coleridge, C.J., and Huddleston, B., held that the defendants were not entitled to interplead on two grounds; first, because they had entered into relations with the plaintiffs, to whom the dock warrants had been transferred; secondly, because the plaintiffs claimed damages against the defendants for the refusal to deliver the wine, and therefore that the claims of the plaintiffs and Lopez respectively were not of the same kind. As to the first ground, Lord Coleridge relied upon *Crawshay v. Thornton* (\*); but that case has become of no effect since the passing of the Common Law Procedure Act, 1860, s. 12, and is inconsistent with the later decisions in *Best v. Hayes* (\*), and *Tanner v. European Bank* (\*). As to the second ground, if the plaintiffs have any real claim for damages in addition to the value of the wine against the defendants, that may be reserved until after the determination of the issues between the plaintiffs and Lopez.

\**Marriott*, Q.C., and *W. Attenborough*, for the [453 plaintiffs: The plaintiffs are entitled to substantial damages for the detention of the wine in addition to the amount representing its value: *France v. Gaudet* (\*), cited in *Mayne on Damages*, p. 16 (3d ed.).

[BRETT, L.J.: The damages claimed for the detention of the wine are too remote, for the defendants had no notice of the alleged sub-contracts at the time when they undertook to keep it: to allow them would be to decide in opposition to a long series of cases.]

At all events, the plaintiffs ought not to be damned by

(\*) 2 My. & Cr., 1.

(\*) 1 H. & C., 718; 32 L. J. (Ex.), 129.

(\*) Law Rep., 1 Ex., 261.

(\*) Law Rep., 6 Q. B., 199.

1878

Attenborough v. St. Katharine's Dock Co.

a change of opponents; the defendants are a solvent company, carrying on business in England, whereas Lopez is a foreigner residing abroad, and may be unable to pay the costs of the issues if he is defeated. The plaintiffs ought not to be compelled to contest in one suit the right to the wines, and in another their claims for damages.

The facts in the present case strongly resemble those in *Crawshay v. Thornton* (\*). The defendants, by issuing the dock warrants, have estopped themselves from denying the plaintiffs' title as assignees thereof. The plaintiffs and the defendants are both innocent parties; but the defendants had a better opportunity of inquiring into the title to the wine, and therefore they, and not the plaintiffs, ought to suffer by the fraud. The warrants were issued under London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxxviii), ss. 106, 107, 108, and the defendants cannot now refuse to recognize a title which arises upon a document issued by themselves.

Then upon the merits Lopez ought to be barred, for until this morning no affidavit has been made upon his behalf, and that affidavit shows that though a fraud was practised upon his agent Speller, nevertheless the property in the wine has passed from him.

The present case is not within the Interpleader Acts: *Slaney v. Sidney* (\*); *Baker v. Bank of Australasia* (\*). The proper remedy for the defendants was to make Lopez a third party to the actions under Rules of the Supreme Court, Order XVI, Rules 17-21.

454] \**[BRETT, L.J.: If that argument were correct, interpleader proceedings on behalf of private persons would be superseded.]*

*Sullivan*, for the claimant Lopez, asked for leave to file a further affidavit.

BRAMWELL, L.J.: It has been held by Field J., and in the High Court of Justice, that these cases do not fall within the Interpleader Act (1 & 2 Wm. 4, c. 58), as amended and altered by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126). I feel myself unable to agree with that decision. From my knowledge of the practice at judges' chambers, I can say that many cases resembling those before us have been dealt with under the jurisdiction created by those statutes. The mischief which the Legislature intended to remedy was of the following nature: a person in possession of goods might be sued by some one setting up a title to them; if the claim was contested, he might be de-

(\*) 2 My. &amp; Cr., 1.

(\*) 14 M. &amp; W., 800.

(\*) 1 C. B. (N.S.), 515.

feated and be liable to pay the value of the goods; and afterwards he might be sued by some other claimant to the goods, and it would be no defence to say that the value of the goods had been already paid to a prior claimant; the new claimant, if he was the real owner, would be entitled to recover in respect of them, and to say that he was not bound by the proceedings in the former action. Therefore a person who had committed no legal wrong, but was simply in possession of goods claimed by other persons, might be compelled to pay their value twice over. The only remedy for this hardship was the expensive procedure by a bill of interpleader. In order to do away with this inconvenient state of matters, the Interpleader Act (1 & 2 Wm. 4, c. 58) was passed, and I think that the cases before us fall exactly within the words of s. 1. These actions are at least modern substitutes for the former actions of "detinue or trover." The defendants do "not claim any interest in the subject-matter of the suit," for their alleged right of lien is not an "interest" in the wine<sup>(1)</sup>. I can see no reason for holding that these cases do not fall within the spirit of this most useful statute.

It has been suggested that the defendants ought not to be allowed to interplead, because the claimant Lopez is a foreigner \*residing out of the jurisdiction of the [455 High Court. That is no ground for rejecting this application, although it may be a reason for making him give security for costs or barring him altogether.

It has been further suggested that the order for interpleader ought to be refused, because the plaintiffs have claims for damages against the defendants, which they have not as against Lopez. Upon the materials before us, I do not think that the plaintiffs can sustain any claim for damages; but I will assume that they have substantial claims, and whatever orders may be ultimately made in these actions, care will be taken to preserve any claims for damages which the plaintiffs fancy that they can enforce.

It has been contended, that by making the interpleader order in the form asked for, the plaintiffs may be exposed to the inconvenience of contesting two suits, one against Lopez with respect to the title to the wine, and the other against the present defendants with respect to the alleged damages. It may be admitted that this is an inconvenience, but it is a less inconvenience than that which the statutes were intended to remove; and the hardship upon the plaintiffs is not to be compared with the hardship upon the

(1) See *Cotter v. Bank of England*, 2 Dowl., 728; 3 M. & Sc., 180.

defendants, who, if the order were refused, might possibly be called upon to pay the value of the wine twice over. Therefore, upon principle, it seems to me that these cases ought to be dealt with under the Interpleader Acts.

Certain authorities have been cited during the argument before us, but in my opinion, with the exception of one case, they all are against the plaintiffs. The decisions in *Meynell v. Angell* (\*), in *Best v. Hayes* (†) and in *Tanner v. European Bank* (‡), fully warrant the application for an interpleader order; but I do not find that they are considered in the judgments delivered in the High Court of Justice. The only case at all in favor of the plaintiffs is *Crawshay v. Thornton* (¶). That was a case of a bill of interpleader filed under the practice formerly existing in the Court of Chancery, and it is unnecessary to consider whether it was correctly decided; for in the cases before us the summonses were issued under 1 & 2 Wm. 4, c. 58, and, 456] as I have before intimated, \*the facts appear to fall precisely within the words of that statute. But I wish also to remark that *Crawshay v. Thornton* (¶) was decided before the passing of the Common Law Procedure Act, 1860, s. 12, and from my own knowledge as one of the common law commissioners I can say that it was intended to do away with the effect of that decision.

It was further contended that the defendants were estopped from denying that the wine is the property of the plaintiffs; but it is clear that in no case is Lopez estopped, and therefore the estoppel cannot operate for the benefit of the defendants. It seems to me a proposition quite incapable of being sustained, that Lopez can recover the value of the wine from the defendants, and that they should at the same time be liable for it to the plaintiffs. Suppose that the defendants, on the trial of these actions, could make out that Lopez is entitled to this wine, that the property in it never passed out of him—in fact, that it was stolen from him, and that Schultz and Dolaro had no title to it; is it conceivable that the defendants would be estopped from setting up this state of matters as an answer to the plaintiffs' claim? I think that there is no estoppel against the defendants in favor of the plaintiffs.

It has been further argued that the application for leave to interplead is unnecessary, for the defendants may proceed to make Lopez a third party to the actions under Rules of the Supreme Court, Order XVI, Rules 17–21. I confess

(\*) 32 L. J. (Q.B.), 14.

(†) Law Rep., 1 Ex., 261.

(‡) 1 H. & C., 718; 32 L. J. (Ex.), 129.

(¶) 2 My. & Cr., 1.

that at one time I thought some weight ought to be attached to this contention; but upon further consideration I am of opinion that it ought not to succeed. The defendants wish to get rid of the litigation altogether, and the Interpleader Acts afford them a ready mode of relieving themselves from the difficulty in which they are placed. Moreover, as Lord Justice Brett has remarked, the argument for the plaintiffs upon this point is too good to be true; for if it were correct, the effect of the rules which I have mentioned would be to abolish altogether proceedings by interpleader at the instance of private persons.

For the reasons which I have assigned, I think that these cases fall within the Interpleader Acts, and that nothing prevents us from giving the defendants the benefit of them. Whatever order \*we may ultimately make, as this is [457 an appeal from a refusal to entertain the application for leave to interplead, the appeal is successful unless the affidavits hereafter to be produced on behalf of Lopez show that upon the merits the defendants ought not to have attempted to interplead. Therefore, as at present advised, I think that they ought to have the costs of it. At all events, as the case is to be adjourned for the benefit of Lopez, who was not ready at the proper time with affidavits in support of his claim, he must pay the costs occasioned to both parties by the adjournment.

BAGGALLAY, L.J.: I agree with the conclusion at which Lord Justice Bramwell has arrived, and also with the reasons which he has assigned. I wish, however, to make some remarks as to that portion of the argument for the plaintiffs which was based upon *Crawshay v. Thornton* (<sup>1</sup>), especially as it appears to have been approved of by Lord Coleridge, C.J. The counsel for the plaintiffs have relied upon the issue of the dock-warrants by the defendants, and have urged that, when they passed into the hands of the plaintiffs, a relation was established between the latter and the defendants, which would bring the facts within the authority of *Crawshay v. Thornton* (<sup>1</sup>). Now it is quite true that that case was decided after the year 1831, when the Interpleader Act was passed, and that the judgment of Lord Cottenham, L.C., proceeded upon the principle, that where the person seeking to interplead had entered into any special obligation with either of the parties claiming a right to the goods, he was not entitled to be relieved in equity. The same principle was, to some extent, adopted in the courts of common law, and as to this I may refer to *James v.*

(<sup>1</sup>) 2 My. & Cr., 1.

*Pritchard*(<sup>1</sup>), which was mentioned in *Meynell v. Angell*(<sup>2</sup>), decided by the present Lord Blackburn. But these decisions were prior to the passing of the Common Law Procedure Act, 1860, s. 12, and I have strong reason to believe that this clause was enacted in order to prevent the further application of the principle laid down in *Crawshay v. Thornton*(<sup>3</sup>). Some cases have been referred to, during the argument, which have been decided since that statute; I allude to *Meynell v. Angell*(<sup>4</sup>), to *Best v. Hayes*(<sup>5</sup>), and to 458] *\*Tanner v. European Bank*(<sup>6</sup>); and in all of these cases it was held that even although it might possibly be doubtful before the Common Law Procedure Act, 1860, whether the courts of common law ought not to follow the principle laid down by Lord Cottenham, L.C., in *Crawshay v. Thornton*(<sup>7</sup>), yet by the passing of that statute all these doubts have been removed, and the fact of a person in possession of goods having entered into a contract with one of the parties claiming them does not debar him from obtaining an exercise in his favor of the powers conferred by the Interpleader Acts. I may go further and say that, in my opinion, if after the Common Law Procedure Act, 1860, s. 12, a bill of interpleader had been filed raising facts like those in *Crawshay v. Thornton*(<sup>8</sup>), any judge of the Court of Chancery would have felt himself no longer bound by the somewhat narrow principle laid down by Lord Cottenham, L.C., but would have acted upon the fuller powers contained in that statute.

BRETT, L.J.: I feel myself unable to agree with the decision in the High Court of Justice; the judgment was, in substance, that Field, J., had no power, under the circumstances of this case, to make an order, and that the facts do not fall within the Interpleader Acts. The ground upon which both Lord Coleridge, L.C., and Huddleston, B., relied, is that if the interpleader order were made, the remedy of the plaintiffs against Lopez would not be coextensive with their remedy against the defendants; and the reason assigned, why the remedies would not be coextensive, is that the plaintiffs may possibly recover, as against the present defendants, not only the value of the wine, but also damages; whereas as between them and Lopez the only contest would be as to the property in the wine: or, as it may be otherwise stated, the claims of the plaintiffs, as against Lopez, could be only a portion of their claims against

(<sup>1</sup>) 7 M. & W., 216; see also *Farr v. Ward*, 2 M. & W., 844.

(<sup>2</sup>) 32 L. J. (Q.B.), 14.

(<sup>3</sup>) 2 My. & Cr., 1.

(<sup>4</sup>) 1 H. & C., 718; 32 L. J. (Ex.), 129.

(<sup>5</sup>) Law Rep., 1 Ex., 261.

the present defendants. I confess that I can see no ground for thinking that the plaintiffs are entitled, as against the defendants, to any damages save those which are ordinarily recovered in an action for conversion; however, I will assume that they have a valid claim for other damages, and that by virtue of some relation existing between the present plaintiffs and the \*present defendants, and arising [459 from either contract or estoppel, they can recover some amount from the defendants, which they cannot recover from Lopez. But even assuming the claims for damages to be valid, I cannot agree with the argument that these cases are not within the Interpleader Acts; I think that our decision must depend upon the language of those statutes, and I agree with Lord Justice Bramwell that the facts before us fall exactly within the terms of 1 & 2 Wm. 4, c. 58, s. 1. I do not think that the statutes apply merely where the opposing claims are coextensive; I think that they bear a wider construction. Therefore it seems to me that Field, J., had jurisdiction to make the order. As to the authorities, in my opinion *Best v. Hayes* (1) and *Tanner v. European Bank* (2) are direct authorities against the proposition put forward on behalf of the plaintiffs. In *Tanner v. European Bank* (2) there was most certainly a contract between the plaintiff and the defendants, and in *Best v. Hayes* (1), if the claimant had not intervened, it would have been difficult for the defendant to show that he was not liable upon a contract made with him as auctioneer; but in each case the question as to the property in the subject-matter in dispute was directed to be tried between the rival claimants. Therefore in the present case the question as to the property in the wine ought to be tried between the plaintiffs and Lopez. I cannot agree that in order to entitle a defendant to interplead, the remedy of the plaintiff against the claimant must be coextensive with the remedy against him.

Lord Coleridge takes another ground, namely, that where one of two claimants to goods has been induced to alter his position through the representation of the person in possession of them, the latter is not entitled to relief under the Interpleader Acts. This view seems to suggest that the defendants by issuing the dock warrants have estopped themselves from denying the plaintiffs' title to the wine; but Lord Coleridge can hardly have considered that an estoppel existed, because he rests this part of his judgment upon *Crawshay v. Thornton* (3), and that case rather seems to de-

(1) 1 H. &amp; C., 718; 32 L. J. (Ex.), 129.

(2) Law Rep., 1 Ex., 261.

(3) 2 My. &amp; Cr., 1.

pend upon the circumstance that the plaintiff in the suit had entered into a kind of contract with one of the defendants. I \*cannot think that in this case there was any estoppel, but I confess that in my view, although a defendant in possession of goods may be technically estopped from denying the plaintiff's claim to them, yet if a *bona fide* claim is made to them by a third person, a judge ought to disregard the technical estoppel and to direct an issue under the Interpleader Acts, to try the question as to the property between the plaintiff and the claimant. However, as I am of opinion upon the facts before us that there was no estoppel, it is unnecessary to determine that point, but I must consider whether the principle upon which *Crawshay v. Thornton* <sup>(1)</sup> was decided ought now to be followed. I will not undertake to say whether, if the Common Law Procedure Act, 1860, s. 12, had not been passed, we ought still to act upon that decision; but it seems to me that after that enactment it is not a binding authority.

Therefore, upon neither ground can I agree with the judgments pronounced in the High Court of Justice. The appeal must be in substance allowed, and the defendants must have the costs which ought to follow the event. As we are bound under the new practice to do what the court below ought to have done, we must hereafter hear the evidence to be adduced as to the title of Lopez.

May 8. An affidavit sworn by W. Speller, the agent in England for Lopez, and carrying on business in Mark Lane, London, was produced, and its substance may be shortly stated as follows:

In February, 1877, in consequence of an advertisement appearing in a newspaper, Speller went to the Charing Cross Wine Cellars, in Northumberland Street, Strand, and saw a man who represented himself to be Mr. Taylor, but whose name was subsequently discovered to be Alfred Ebenezer Schultz. This man represented himself as the proprietor of the business, and stated that he required wine in order to carry it on; he also at subsequent interviews informed Speller that he required wine for exportation to India, where he had customers. He gave orders to Speller, which the latter transmitted to Lopez in Spain. Lopez accordingly shipped 461] the wine for London, and sent the bills of lading to Speller. Subsequently to giving the orders, Speller discovered that the person whom he supposed to be Taylor, was really Schultz, and was only an employe at the Charing Cross Wine

(1) 2 My. & Cr., 1.



Cellars; he thereupon demanded an explanation. Schultz admitted that his name was not Taylor, but stated that it was William Schultz, and further said that, although Taylor was the proprietor of the business, he knew nothing of the wine trade, and therefore he, Schultz, managed the business for him. Schultz further represented himself to be a man of large private means, and to have many customers. Being unable to learn upon inquiry that anything was known to the disadvantage of William Schultz, and believing the last mentioned representation to be true, Speller banded in May, 1877, the bill of lading to Schultz. Speller afterwards discovered that Schultz was named Alfred Ebenezer, and not William, that he was a bankrupt and in poor circumstances, and that he was carrying on no business on his own account. The value of the wine was £1,031. A prosecution for fraud was thereupon instituted against Schultz, who was convicted at the Middlesex Sessions upon an indictment charging him with having obtained credit by fraud, contrary to the provisions of the Debtors' Act, 1869, and was sentenced to nine months' imprisonment with hard labor. Upon one occasion when Speller was at the Charing Cross Wine Cellars, he was introduced by Schultz to a man named Curtis, and was informed by Schultz that Curtis was a dealer in cigars, and supplied them to the cellars. Curtis gave Speller an order for wines, which was executed. Curtis said that he would introduce Speller to a customer, and appointed to meet him at a house in Charlotte Street, Portland Place. Upon going to the house which proved to be a cigar shop with the name "Dolaro" on the window, Speller found there Curtis and two other men named Dolaro and Cohen; the two last named appeared to be bargaining for the purchase of cigars. Dolaro was introduced by Curtis to Speller, and he gave Speller an order for wine to the value of £398. Upon the representation that the wine was required by Dolaro for customers, Speller transmitted the order to Lopez, who caused it to be shipped, and by the bill of lading made it deliverable to the order of Speller; the bill of lading was indorsed by Speller and handed over to Dolaro. Subsequently Schultz stated to Speller that Cohen was a first-class man, and a \*wholesale cigar merchant, and that Speller [462 need have no hesitation in trusting him. Cohen then gave Speller an order for wines to the value of £137, representing that he required them in the ordinary course of trade; Speller transmitted the order to Lopez in Spain, who caused the wines to be shipped, and by the bill of lading made

1878

Attenborough v. St. Katharine's Dock Co.

them deliverable to the order of Speller; the bill of lading was indorsed by Speller and handed by him to Cohen. Speller subsequently ascertained that Dolaro was only a lodger at the house in Charlotte Street, that the house had been taken by Cohen, that the dealing as to the cigars between Cohen and Dolaro was merely a sham to deceive him, that both Cohen and Dolaro were merely men of straw, and that none of the wines ordered by them were required by them in the ordinary course of trade. The wines obtained by Schultz, Dolaro, and Cohen were pawned soon after the dock warrants were issued. Curtis, Dolaro, and Cohen had absconded, and their whereabouts could not be ascertained. The wines claimed by the plaintiffs respectively in these actions were a part of the wines obtained from Speller by the fraudulent representations above mentioned.

*Cohen, Q.C. (Sullivan, with him), for Lopez:* No doubt if the contracts made by Speller with Schultz, Dolaro, and Cohen, were merely voidable, Lopez would have great difficulty in maintaining his claim to the wine against the plaintiffs in these actions, because the contracts were not avoided until after the plaintiffs had obtained some interest in the wine; but it is submitted for Lopez that on the following grounds these contracts were wholly void: first, because, although Speller intended to sell, neither Schultz, Dolaro, nor Cohen intended to buy; secondly, because Speller intended to sell different portions of the wine upon separate contracts with these three persons, whereas they were acting in collusion with each other, and intended to obtain possession of the wine for their joint benefit; thirdly, because the plaintiffs have never had possession of the wine itself.

As to the first ground, it is submitted that there was no transfer of the property in the wine, for Schultz, Dolaro, and Cohen did not intend to buy, and did not really accept Speller's terms of sale.

[BRETT, L.J.: They intended to buy the wine but not to pay for it.

463] \*THE SINGER, L.J.: Speller dealt with the persons, with whom he really intended to deal; the facts of the present cases do not resemble those in *Cundy v. Lindsay* (1).]

There was no assent by Schultz, Dolaro, and Cohen to the sale, and therefore there was no contract. The whole of the proceedings by these three persons was a mere scheme to obtain by fraud the possession of the wine; if a person

obtains possession of goods by fraud without a contract, the property in them does not pass to him, as is plain from the view taken in the Exchequer Chamber of the facts in *Kingsford v. Merry* <sup>(1)</sup>.

[BRETT, L.J.: Dolaro, Schultz, and Cohen did not steal the wine; they could not have been convicted upon an indictment charging them with larceny. They obtained possession of the documents representing the wine by false statements, which induced Speller to enter into contracts with them personally; it might have been different if he had parted with the documents under the belief that he was negotiating with persons whom Dolaro, Schultz, and Cohen falsely alleged that they were authorized to represent.]

As to the second ground, although Speller intended to enter into separate contracts with the three persons, they conspired to obtain the wine for their joint advantage; they intended to make themselves co-owners; the parties never were *ad idem*.

As to the third point, the plaintiffs have simply got possession of the dock warrants, and a pledge of these documents is not equivalent to a pledge of the wine itself; a dock warrant does not transfer the property in the goods to which it relates, as is plain from *MacEwan v. Smith* <sup>(2)</sup>; *Johnson v. Credit Lyonnais Company* <sup>(3)</sup>: it is not like a bill of lading; and the defendants have never attorned to the plaintiffs; it was merely an equitable interest or charge, and not the property which became vested in the plaintiffs, and according to the authorities an owner of goods obtained from him by fraud can be prevented from following them only when the property has vested in some other person. In order that a pledge may defeat the right of a defrauded owner, the chattel itself, and not the mere indicia of property, must be delivered to the pledgee. The rights of the plaintiffs lay merely in contract, and this is insufficient to bar the title of the true owner.

\**Marriott, Q.C., and W. Attenborough*, for the [464 plaintiffs: It may be admitted that a dock warrant does not pass the property in goods like a bill of lading; but the plaintiffs really advanced the money on the wine, and the dock warrants were handed to them merely to enable them to get the wine transferred into their own names in the defendants' books. At the very least the plaintiffs had a special property in the wine, coupled with a constructive

<sup>(1)</sup> 1 H. & N., 503; 26 L. J. (Ex.), 83.

<sup>(2)</sup> 2 H. L. C., 309,

<sup>(3)</sup> *Ante*, p. 32.

possession of it. The deposit of the dock warrants with the plaintiffs was a constructive delivery of the wine: Benjamin on Sales, p. 573 (2d ed.), and this is sufficient to vest a title in them (').

*Watkin Williams*, Q.C., for the defendants, was not heard.

*Murphy*, Q.C., for Lopez, in reply: It is admitted that it is an inconvenient course to decide the conflicting rights of the parties upon motion; an issue ought to be granted, in order that the facts may be clearly ascertained. If the plaintiffs have an equitable interest in the wine, so also has Lopez, who is the unpaid vendor; the equities are equal, and the question must be decided by the legal right to the ownership of the wine; that clearly remains vested in Lopez. At any moment Dolaro may be arrested, and afterwards may be tried and convicted on the prosecution of Lopez, under 24 & 25 Vict. c. 96, ss. 1, 88; in that event Lopez would be entitled to a restitution of the wines or their proceeds under s. 100 of that statute ('); it is rather hard upon him if he is summarily deprived of that remedy by these interpleader proceedings.

BRETT, L.J.: At the hearing on the 1st of May this court, as then constituted, decided that these cases fall within the Interpleader Acts, and that inasmuch as this court is bound 465] to give the \*judgment which the High Court ought to have given, it is necessary to determine the rights of the parties. We think that the defendants are entitled to relief, and the question to be now determined is, whether the claimant Lopez ought to be barred. At the former hearing the only affidavit produced before us on behalf of the claimant was one from his solicitor, who was unable to speak clearly as to the facts. At the present hearing we have before us an affidavit from Speller, his agent; nevertheless, even on the facts stated in it, we must decide against the claimant. Speller, as the agent of Lopez, was authorized to sell the wine: he was in possession of the bill of lading, and was authorized to hand it over to any person who should buy

(') In the course of his argument Marriott, Q.C., observed that the present actions were unaffected by the Factors Act, 1877 (40 & 41 Vict. c. 39), as that statute was not passed until after the facts of these cases had happened.

(\*) See *Scattergood v. Sylvester*, 15 Q. B., 506, a case of larceny, but the property stolen had been sold in market overt. In the course of the argument W. Attenbo-

rough informed the court that when Schultz was convicted at the Middlesex Sessions, under the circumstances mentioned in Speller's affidavit, an order for restitution was asked for, but the presiding judge refused to grant it, on the ground that the Debtors Act, 1869 (32 & 33 Vict. c. 62), the statute under which Schultz was convicted, did not authorize him to do so.

the wine. Speller was induced by fraud to enter into a contract of sale. He intended to pass the property in the wine to the pretended buyers, and for that purpose he handed to them the bill of lading. There was a complete contract of sale passing the property in the wine, although that contract was induced by fraud. The legal effect was the same as if the contract of sale had been entered into by Lopez himself. The property in the wine became vested in Dolaro and Schultz. It is true that upon discovering the fraud Lopez might have disavowed the contract; but before he could avoid it, Schultz and Dolaro entered into verbal contracts with the plaintiffs for advances upon the security of the wine, and professed to confer upon them a lien with a power of sale if the advances should not be repaid within three months. That was a contract to pledge, although the pledge itself was not completed. The plaintiffs advanced the money and received the dock warrants in order that they might obtain either an actual or at least a constructive possession, and thereby render the pledge perfect. The defendants, however, refused to act upon the dock-warrants, and therefore the pledge has never been completed. The plaintiffs have nevertheless a good equitable right to the wine created by those in whom the property was for the time vested, and Lopez cannot now put an end to it by annulling the contract made on his behalf by Speller. Before he can receive the wine or its proceeds, he must satisfy the claim of the plaintiffs. After the lapse of three months they had, by virtue of the contract with Dolaro and Schultz, the power to sell; but they could only sell to repay themselves the \*amount of their advances and the costs of the [466 sales. If Dolaro and Schultz had been honest persons, the plaintiffs would have been obliged to account to them for the difference between the amount representing their advances and the costs of the sale and the price which the wine might fetch. A similar principle must be applied as regards the claimant, and therefore the proper order will be that Lopez be barred upon the plaintiffs undertaking to account to him for the difference between the price at which the wines sell and the amount representing their advances, the costs of the sales, and the costs of the hearing.

COTTON and THESIGER, L.JJ., concurred.

*W. Williams*, Q.C., applied that the defendants' costs and charges might be a first charge upon the proceeds of the sale of the wine, and cited *Duear v. McKintosh* (').

(') 2 Dowl., 730; 3 M. & Sc., 174.

1878

Kaltenbach v. Mackenzie.

BRETT, L.J.: . We think that the costs and charges of the defendants ought to be a first charge upon the fund.

*Appeal allowed, the actions being stayed as to the wine and the claimant being barred (').*

Solicitors for plaintiff, Percy Attenborough: *G. H. K. & G. A. Fisher.*

Solicitor for plaintiff, Robert Attenborough: *John Attenborough.*

Solicitor for defendants: *Hacon.*

Solicitor for claimant, Lopez: *E. D. Lewis.*

(<sup>1</sup>) The order of this court (the formal parts being omitted) in the action brought by Percy Attenborough was drawn up in the following terms:

"The plaintiff hereby undertaking to account to the said Diego Lopez for the surplus proceeds of the sales of the wines over his advances and interest, and the costs of sales, and the costs of the former hearing as well as of this hearing, it is ordered that the said claimant, Diego Lopez, be barred; and it is further ordered that upon payment by the plaintiff

to the defendants or their solicitors of the costs of the defendants in the interpleader proceedings and their charges, which costs and charges are to be a first charge on the wines, the defendants to deliver the wines to the plaintiff or his purchasers on his order, and that on delivery of the wines to the plaintiff's order this action be stayed as to the plaintiff's claim for the wines."

The order in the action brought by Robert Attenborough was drawn up in similar terms.

[8 Common Pleas Division, 467.]

June 4, 1878.

[IN THE COURT OF APPEAL.]

467]

\*KALTENBACH V. MACKENZIE.

*Marine Insurance—Constructive Total Loss—Abandonment, Notice of—Ship, Sale of.*

Where the assured receives full and reliable information that the subject-matter of the insurance is in imminent danger of becoming a total loss, he is bound, in order to enable him to recover as for a constructive total loss, immediately to give notice of abandonment to the underwriter, and his omission to do so will not be excused because afterwards the subject-matter of the insurance is justifiably sold.

ACTION on a policy of marine insurance to recover a salvage loss of £94 11s. per cent. under a Lloyd's policy for £4,000 on the ship *Amiral Protet* for six calendar months from the 4th of October, 1870.

At the trial before Lord Coleridge, C.J., during the Hilary Sittings, 1877, in London, the following facts were proved:

The plaintiff is a merchant residing at Zurich, and a partner in the firm of Kaltenbach, Engler & Co., trading at Singapore and Saigon, and the registered owner of the *Amiral Protet* ('). The defendant is an underwriter at Lloyd's, and

(<sup>1</sup>) The plaintiff, being a naturalized but the firm, it appeared, were the real British subject, was the registered owner; owners of the vessel.

subscribed the policy on the Amiral Protet for £100. On the 14th of January, 1871, the Amiral Protet sailed from Saigon with a cargo of rice for Hong Kong. On the 22d of January, while on that voyage, she struck on the Britto Bank. She was got off the same day, and brought back to Saigon on the 24th of January. She was surveyed on the 28th of January, and a further survey was made on the 3d of February when she was in dry dock. The surveyors reported that the expense of the repairs would exceed the value of the ship when repaired, and they consequently condemned her as a constructive total loss. On the 7th of February she came out of the dry dock, and was anchored in smooth water, and there was no evidence to show that the vessel was in imminent danger of perishing, or that there was any immediate necessity for the sale. She was, however, by order of the Saigon firm, on the 23d of February, \*sold by public auction for 1,600 dollars. She was [486 purchased by a Chinaman, repaired at an expense of fifty dollars, and sent down to Singapore, where she was resold. She was subsequently further repaired for about £500, and made a ship fit to carry dry cargoes. The following correspondence was put in evidence at the trial :

On the 30th of January, 1871, the firm at Saigon wrote to the firm at Singapore, giving the details of the disaster, and on the 31st of January the Singapore firm forwarded that information to the plaintiff by letter, and added, "as the ship and freight is pretty well insured, it would not be so distasteful to us if the ship should be condemned ; if this should happen we will inform you by telegraph as soon as we get particulars." On the same day the master of the vessel, Grant, wrote to the Singapore firm announcing that the vessel had run on shore at Britto Bank, and stating that "a survey was passed on board from Lloyd's on Saturday last, and they report the vessel is in very bad condition, and recommend that she be put in dock to examine her bottom . . . It is more than probable that the survey in the dock will recommend that she be condemned, but I shall await your instructions before taking any final steps."

On the 3d of February, Grant, from Saigon, wrote to the Singapore firm : "The Amiral Protet is in dock, and the final survey was passed upon her this morning. The report of the surveyors is that such is the state of the vessel from injuries received, and the repairs required to put her in good condition are such that it will cost at this port from 18,000 to 20,000 dollars to effect them, and that it will take four

1878

Kaltenbach v. Mackenzie.

months to finish her. . . . The survey reports recommend the vessel to be sold for the benefit of the underwriters. I may further state that the vessel in her present state is not in a fit state to leave the port to go to another."

On the 3d of February Waterson & Bailey, the surveyors, made a report of their survey of the ship and recommended a sale; this report was duly forwarded by the Saigon firm to the Singapore firm.

On the 7th of February the Singapore firm wrote to Grant that they had received his letters of the 30th of January and the 3d of February, and stated:

"When the surveyors called by the agents of the English Lloyd's further state that the vessel in her present state is not fit to leave the port to go to another port to undergo repairs there, I think it is the best when you follow the advice of the surveyors, and let the vessel be sold. . . . When I could have any idea what the repairs of the Amiral Protet would cost here, I would telegraph to the insurance in England, and ask for their advices if we shall order the vessel down for their accounts and repair her here, but as you say she is not fit to go to sea it is impossible to bring her down . . . it is much more in the interest of the insurance to sell her there."

On the 7th and 8th of February copies of the letters from Grant to the Singapore firm were forwarded by them to the 469] \*plaintiff, the writers stating "that we could not be so very sorry if the vessel should be condemned and left for account of the underwriters."

On the 27th of February the Singapore firm wrote to I. C. im Thurn, of London, the plaintiff's insurance brokers, as follows:

"We are sorry to inform you that at a survey held on the Amiral Protet in the Government Dock in Saigon it has been found that the damages are so serious that it would cost from 18,000 to 20,000 dollars to repair the same, and that the repairs would take four months' time. As government cannot place the dock at the ship's disposal for such length of time, the same being more specially reserved for repairing men-of-war; considering, also, that in her present state she could not sail for some other port for repairs, and as the cost of repairs would have exceeded the amount insured on her, the surveyors recommended that the Amiral Protet should be sold for account of the underwriters, and the sale was to take place on the 23d. We do not know



as yet how the sale has turned out. Kindly inform the writers of the above facts, and tell them that we shall send in the average documents as soon as possible. P.S.—We have just learnt from Saigon that the Amiral Protet has been sold at public auction for the sum of 1,600 dollars.”

The information contained in this letter was forwarded to the plaintiff at Zurich, and it was alleged that notice of abandonment was given to the underwriters on the 10th of March.

At the close of the plaintiff's case it was contended, on behalf of the defendant, that the plaintiff could not recover for a constructive total loss, for the plaintiff had not given any notice of abandonment. It was contended, on behalf of the plaintiff, that it was a question for the jury whether there was a constructive total loss; and if they so found, it was a further question for them whether, if the underwriter had received notice of abandonment, he could have taken any other course than that the plaintiff had adopted, or could have obtained any advantage from the notice of abandonment.

Lord Coleridge, C.J., ruled that a notice of abandonment was a condition precedent to the plaintiff's right to recover, and directed judgment of nonsuit to be entered.

A rule was afterwards obtained by the plaintiff for a new trial, on the ground that the judge wrongly determined and misdirected the jury in holding that on the facts proved at the trial the plaintiff was not entitled to recover as for a total loss, and in holding and directing that as matter of law a notice of abandonment was \*necessary, and in with- [470 drawing all questions of fact from the determination of the jury.

The rule was twice argued: first, before Grove and Lopes, JJ., by Butt, Q.C., Cohen, Q.C., and Hollams, for the defendant, and Sir H. James, Q.C., W. Williams, Q.C., and Mathew, for the plaintiff; and a second time by the same counsel before Grove, Denman, and Lopes, JJ. The court considered that there was some evidence which ought to have been left to the jury, and ordered a new trial.

The defendant appealed.

May 31, June 3. *Cohen*, Q.C., and *Hollams*, for the defendant, contended that there was no constructive total loss, and that there was no notice of abandonment before sale. They cited *King v. Walker* <sup>(1)</sup>; *Farnworth v. Hyde* <sup>(2)</sup>;

<sup>(1)</sup> 3 H. & C., 209; 33 L.J. (Ex.), 325; 34 L.J. (C.P.), 207.

<sup>(2)</sup> 18 C. B. (N.S.), 835.

*Farnworth v. Montefiore* <sup>(1)</sup>; *Rankin v. Potter* <sup>(2)</sup>; *The Oriental* <sup>(3)</sup>.

*W. Williams* and *J. C. Mathew*, for the plaintiff, contended that, first, on the facts proved at the trial it was not necessary to give any notice of abandonment, and it was a question for the jury if notice had been given whether it would have been of any use to the defendant; secondly, if a notice were necessary, that notice had been given. They cited *Cobequid Marine Insurance Co. v. Barleaux* <sup>(4)</sup>; *King v. Walker* <sup>(5)</sup>; *Roux v. Salvador* <sup>(6)</sup>; *Dent v. Smith* <sup>(7)</sup>.

June 4. BRETT, L.J.: This case raises the questions of abandonment and notice of abandonment on a policy of marine insurance. Before I enter upon the merits of the present case I think it desirable to state my view of the law.

I agree that there is a distinction between abandonment and notice of abandonment, and I concur in what has been said by Lord Blackburn <sup>(8)</sup>, that abandonment is not peculiar to policies of marine insurance; abandonment is part of [471] every contract of indemnity. Whenever, therefore, there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity. The doctrine of abandonment in cases of marine insurance arises where the assured claims for a total loss. There are two kinds of total loss; one which is called an actual total loss, another which in legal language is called a constructive total loss; but in both the assured claims as for a total loss. Abandonment, however, is applicable to the claim, whether it be for an actual total loss or for a constructive total loss. If there is anything to abandon, abandonment must take place; as, for instance, when the loss is an actual total loss, and that which remains of a ship is what has been called a congeries of planks, there must be an abandonment of the wreck. Or where goods have been totally lost, as in the case of *Roux v. Salvador* <sup>(6)</sup>, but something has been produced by the loss, which would not be the goods themselves, if it were of any value at all, it must be abandoned. But that abandonment takes place at the time of the settlement of the claim; it need not take place before.

With regard to the notice of abandonment, I am not aware

<sup>(1)</sup> Law Rep., 2 Q. B., 511.

<sup>(2)</sup> Law Rep., 6 H. L., 83; 5 Eng. R., 40.

<sup>(3)</sup> 7 Moo. P. C. C., 398.

<sup>(4)</sup> Law Rep., 6 P. C., 319.

<sup>(5)</sup> 3 H. & C., 209; 33 L. J. (Ex.), 325.

<sup>(6)</sup> 3 Bing. N. C., 266.

<sup>(7)</sup> Law Rep., 4 Q. B., 414.

<sup>(8)</sup> *Rankin v. Potter*, Law Rep., 6 H. L., at p. 118; 5 Eng. R., 70.

that in any contract of indemnity, except in the case of contracts of marine insurance, a notice of abandonment is required. In the case of marine insurance where the loss is an actual total loss, no notice of abandonment is necessary; but in the case of a constructive total loss it is necessary, unless it be excused. How, then, did it arise that a notice of abandonment was imported into a contract of marine insurance? Some judges have said it is a necessary equity that the insurer, in the case of a constructive total loss, should have the option of being able to take such steps as he may think best for the preservation of the thing abandoned from further deterioration. I doubt if that is the origin of the necessity of giving a notice of abandonment. It seems to me to have been introduced into contracts of marine insurance—as many other stipulations have been introduced—by the consent of shipowner and underwriter, and so to have become part of the contract, and a condition precedent to the validity of a claim for a constructive \*total loss. The reason why [472 it was introduced by the shipowner and underwriter is on account of the peculiarity of marine losses. These losses do not occur under the immediate notice of all the parties concerned. A loss may occur in any part of the world. It may occur under such circumstances that the underwriter can have no opportunity of ascertaining whether the information he received from the assured is correct or incorrect. The assured, if not present, would receive notice of the disaster from his agent, the master of the ship. The underwriter in general can receive no notice of what has occurred, unless from the assured, who is the owner of the ship or the owner of the goods, and there would therefore be great danger if the owner of a ship or of goods—that is, the assured—might take any time that he pleased to consider whether he would claim as for a constructive total loss or not—there would be great danger that he would be taking time to consider what the state of the market might be, or many other circumstances, and would throw upon the underwriter a loss if the market were unfavorable, or take to himself the advantage if the market were favorable. These are the reasons why I think the assured and the underwriters came to the conclusion that it should be a part of the contract and a condition precedent that, where the claim is for a constructive total loss, there must be notice of abandonment, unless there were circumstances which excused it.

Notice of abandonment, therefore, being a part of the contract, questions arose as to the time when that notice should be given. The first question which arose was whether

the notice must be given at the first moment that the assured heard of the loss, or at some subsequent period. It was, however, decided that it is not at the moment of the first hearing of the loss notice of abandonment must be given, but that the assured must have a reasonable time to ascertain the nature of the loss with which he is made acquainted ; if he hears merely that his ship is damaged, that may not be enough to enable him to decide whether he ought to abandon or not ; he must have certain and accurate information as to the nature of the damage. Now, sometimes the information which he receives discloses at once the imminent danger of the subject-matter of insurance becoming and continuing a total loss ; as, for instance, if he hears his ship 473] is captured in time of war, it \*must be obvious to everybody, unless the ship is recaptured, it would be a total loss ; or if he hears that the ship is stranded, and her back is broken, although she retains her character as a ship, if he gets information upon which any reasonable man must conclude that there is very imminent danger of her being lost, the moment he gets that information he must immediately give notice of abandonment. The law that has been laid down is, that immediately the assured has reliable information of such damage to the subject-matter of insurance as that there is imminent danger of its becoming a total loss, then he must at once, unless there be some reason to the contrary, give notice of abandonment ; but if the information which he first receives is not sufficient to enable him to say whether there is that imminent danger, then he has a reasonable time to acquire full information as to the state and nature of the damage done to the ship.

But then there arose another question. Ships, or goods, or the subject-matters of marine insurance, are liable to danger at various parts of the globe, where neither the assured nor the underwriter is present ; and upon the emergency the master of the ship being there alone, must act. Now, under those circumstances, masters have often sold either ship or goods ; and masters have had to consider whether they would sell the ship or goods even in cases where such ship or goods are not insured. The general rule with regard to the propriety of a master selling the ship or the goods, is that he has no right to sell either the ship or the goods without the consent of the owner, but if necessity arises the master becomes what is called, from the necessity of the thing, the agent to bind his owner by a sale, or to bind the owner of goods by a sale. Now, the rule I should say from the necessity of things, at all events from the jus-

tice of things, is this, that if the circumstances are such that any reasonable person having authority from the owner would sell, then the master is entitled to sell, although he has not such authority. The question, I think, as between the person to whom a master sells and the owner of the property, is whether the circumstances were those which would have caused a reasonable owner, had he been present, to sell. If that state of things exists, the master has authority to sell, and his act is binding upon the owner of the ship or goods. Where, therefore, there has \*been a [474 constructive total loss of either ship or goods, circumstances may have arisen which would justify the master in selling, or they may not; there may be a constructive total loss without any sale, and there may also be a constructive total loss accompanied by a sale. If the first information which the assured, not being present, has of the damage which has occurred to his ship, or being the owner of goods of the damage which has occurred to his goods, although they were not an actual total loss by reason of the perils of the seas, is accompanied also by information that the master has sold, and if the circumstances of that sale were justifiable, so that the property passed to the vendee, under those circumstances that is the time when, if at all, the assured would be bound to give notice of abandonment; and in some of the earlier cases it was considered that even then the assured must give notice of abandonment; but in others that doctrine seems to be questioned. In *Rankin v. Potter* (') the law was established that where at the time when the assured receives information which would otherwise oblige him to give notice of abandonment, at the same time he hears that the subject-matter of the insurance has been sold so as to pass the property away, inasmuch as there was nothing of the subject-matter of the insurance which he could abandon, notice of abandonment was not necessary. No doubt the reason given for this was that notice at that time and under such circumstances would be a mere idle ceremony; it could be of no use. That was the point decided in *Rankin v. Potter* ('). In those particular circumstances it was held that notice of abandonment need not be given because there was nothing to abandon. That in one sense is true; but if goods had been sold it is obvious there must be something to abandon, that is, the proceeds of the sale; the money which is the proceeds of the sale, when the insurance is settled, is abandoned; but where there is nothing of the subject-matter of insurance to abandon, there is no

(') Law Rep., 6 H. L., 88 · 5 Eng. R., 40.

1878

Kaltenbach v. Mackenzie.

ship to abandon, there are no materials of the ship to abandon, there are no goods to abandon, notice of abandonment under those circumstances was said to be futile. But *Rankin v. Potter* <sup>(1)</sup> went no further; it did not decide—because the point was not raised—that if, at the time when the assured had to make up his mind and when otherwise he 475] ought to \*abandon, there was no sale of the subject-matter of the insurance, the assured would be excused from giving notice of abandonment if he was able to show that, had he given such notice, in the result it would have turned out to be of no use. It was argued before us that the necessary inference to be drawn from *Rankin v. Potter* <sup>(1)</sup> was, although there had been no sale of the subject-matter of the insurance when information of the disaster was received by the assured, yet if he could show that before any notice of abandonment could reach the underwriter and before the underwriter's orders could reach the assured a sale could take place, so that had the assured given notice of abandonment such notice would have been of no use to the underwriter, the assured would be excused from giving it. That point, however, is not raised here, and therefore it becomes unnecessary to decide it. I am not prepared to say that if it could be shown that the subject-matter of insurance, at the time when the assured has information upon which otherwise he would be bound to act, is in such a condition that it would absolutely perish and disappear, before notice could be received or any answer returned, that that might not excuse the assured from giving notice of abandonment, but I am prepared to say that nothing short of that would excuse him; and although I do not say what I have stated would excuse him, I am not prepared to say it would not; that is the limit to which I think the doctrine could be carried, and it seems to me that to go further than that would let in the danger to provide against which the doctrine of notice of abandonment was introduced into the contract and made a part of the contract.

Having stated my view of the law, I proceed to apply it. In the present case the ship was grievously injured, and, I think, in order to consider the ruling of Lord Coleridge, C.J., we must take it for the purpose of the argument that she was so much injured that there was imminent danger of her becoming a total loss, and I think we must take it she had sustained damage to this extent, that she was what is called a constructive total loss, that is to say, that she was in such a condition that the assured would be, if he fulfilled

<sup>(1)</sup> Law Rep., 6 H. L., 58; 5 Eng. R., 40.

all other conditions, in a position to claim for a constructive total loss. We must not forget that the ship must be in a \*condition to justify what was done afterwards, [476 otherwise the fact of sale or the fact of giving notice of abandonment had no effect whatever. A sale cannot make a total loss; notice of abandonment cannot enable the assured to recover for a total loss unless the sale was justifiable by the circumstances, and the circumstances were such as to justify a person in claiming for a total loss. The constructive total loss, in other words, must exist before either the sale or the notice of abandonment; the circumstances must be such as to justify it. I think we must take it the ship was in such a condition, that the assured was entitled to abandon, and to claim for a total loss, but for a constructive total loss only: the questions then are, first, whether the assured was excused from giving notice of abandonment, and, if not, whether he gave any notice of abandonment; and, secondly, if he did give notice of abandonment, whether he gave it within the legal time, because if he gave the notice, yet if he did not give it within the legal time, he cannot recover as for a total loss.

It was argued before us that this was an actual total loss. I do not stop to enter into that; it is clear that the ship was not an actual total loss; but I think we are bound to take it that she was a constructive total loss; that is, she was in imminent danger of becoming a total loss to her owner. She may become a total loss to her owner either by perishing, although she has not yet perished, or she may become a total loss by reason of the cost of the repairs being greater than the value of the ship when repaired; in either case she becomes a total loss to her owner. I think we must take it that the circumstances were such that the owner had a right to consider that in all probability the cost of repairing that ship would be greater than her value when repaired, and that she would become a total loss. Therefore he was justified in assuming there was imminent danger of her becoming a total loss, and he would, according to the rule I have enunciated, the moment he received information which would lead any reasonable man to come to that conclusion, be bound to give notice of abandonment unless he was excused.

The owners who were in truth the real assured were a firm, some of whom were resident at Singapore, and the owners resident at Singapore were bound to act in the matter of this insurance \*and claim. On the 7th of [477 February those owners at Singapore received certain in-

1878

Kaltenbach v. Mackenzie.

formation as to the condition of the ship, and they did not in fact receive any material additional information after that time, and upon that very information which they received they did eventually act, in resolving to abandon the ship and in giving notice of abandonment, if any notice was ever given. It is clear that, unless they were otherwise excused, on the 7th of February they had such information with regard to this ship as showed that she was in imminent danger of becoming a total loss, and that at that time they were bound to act upon it, and to make up their minds whether they would abandon or not, and if they made up their minds to abandon, to give notice of abandonment. That being the state of things, on the 7th of February the ship was not sold. Therefore the case is not within the rule in *Rankin v. Potter* ('). They did not receive notice of such damage as made it imminent that the ship might become a total loss, and at the same time notice that the ship was sold, but they received the information of the damage that had happened to the ship before they received information that the ship was sold. But it is said that at that time the ship was in such a condition that, before any answer to a notice of abandonment could be received from the underwriter, a reasonable man might have sold her. I do not enter into that consideration, because that is not the rule by which the case is governed. It was said that the assured ought to have sent forward the information by telegraph. If the telegraph was in use and known by the majority of persons in business to be in use between Singapore and Europe, it is clear the information ought to have been telegraphed to the underwriter in London, but if that was not so, then it would be justifiable to send the information to Europe by letter; but however that may be, there is no evidence to justify a jury in saying that the ship would actually have perished as a ship before an answer could be returned. Therefore it seems that that point which has been put to us did not arise in this case. It would appear the owners had notice of the imminent danger of the ship on the 7th of February, and the case is not brought within *Rankin v. Potter* ('); therefore the owners ought to have given notice of abandonment 478] immediately \*after the 7th of February. They ought to have sent forward that notice unless circumstances prevented them. When I say that they were bound to send notice immediately to the underwriters, it must be subject to this, that if there was no post for a fortnight, "immediately" then is extended into a fortnight; but they would

(') Law Rep., 6 H. L., 83; 5 Eng. R., 40. ●



have no right to let a post pass, neither would they have any right to do what they did, which was not to send notice to the underwriters, not to send notice to an agent to inform the underwriters, not to send instructions to anybody to abandon the ship, but to send forward a mere report stating the circumstances about the ship to their co-owner at Zurich, not to tell him to abandon, but leaving it to him to consider whether he would abandon or not. The owners at Singapore might have intended to act in perfect good faith to the underwriters, but they made this mistake: instead of sending to the underwriters or to the agent of the underwriters notice of their intention to abandon, they did neither one nor the other, but they only sent forward a communication to their co-owner, in order that he should determine whether he would abandon or not. They failed to send notice of abandonment, and the question does not arise of within what time notice of abandonment was given. But it was assumed by Lord Coleridge, C.J., and therefore we must take it, either that on the 11th of March the underwriters received the notice, or that it was on the 11th of March the assured resolved to send and did send the notice; but even if the underwriters received it on the 11th of March, there is the fatal gap between the time when the owners at Singapore received that information and the time when the owner at Zurich made up his mind to act upon it. It was the owners at Singapore who ought to have acted, and they ought either on the 7th or by the next post or the next telegraph to have sent forward notice to the underwriters, or at all events instructions to some agent of theirs to give notice to the underwriters, because the only mode of abandonment in cases of marine insurance is to give notice of abandonment, and the assured is bound to give notice. It is the notice which is the symbol of the abandonment. That notice must be given within a particular time. In this case it is obvious it was not. Therefore, although it must be assumed there were circumstances which entitled the assured to treat the loss as a total loss, and although [479] it must be taken that at some time or other he did give notice of abandonment, yet in my opinion the evidence was beyond dispute that he did not give notice of abandonment at the proper time, and the giving notice in proper time, unless some excuse exists, is a condition precedent. No such excuse existed in this case. Therefore Lord Coleridge was right in saying that the plaintiff could not recover. The judgment of the Common Pleas Division, with great

(<sup>1</sup>) Law Rep., 6 H. L., 83; 5 Eng. R., 40.

deference, was wrong. The court carried the words of Lord Blackburn in the opinion which he gave in *Rankin v. Potter* (') too far. They carried them further than the decision required, and I cannot help thinking they carried them further than Lord Blackburn intended them to be carried. This appeal must therefore be allowed.

COTTON, L.J.: This is an action upon a policy of marine insurance, and the question we have to consider is whether Lord Coleridge, C.J., was right in saying there was no question for the jury, and that the plaintiff could not recover for a constructive total loss, on the ground that he had not given notice of abandonment. The Common Pleas Division decided that the case ought to go down for a new trial, in order as I understand their decision, that the jury might be asked whether or no, if notice of abandonment had been given, it would have been, in the result, of any use to the underwriters. Although the claim was for a total loss, yet the ship existed as a ship, notwithstanding the damage it had sustained. For the purpose of our decision, we must consider the damage was such that the shipowner was entitled to treat it as a constructive total loss, and on that footing to claim on the policy as for a total loss. A "constructive total loss" is when the damage is of such a character that the assured is entitled, if he thinks fit, to treat it as a total loss. When, as in the present case, the assured elects to treat the loss as a total loss, he is bound to transfer to the underwriters the subject-matter insured. The general rule is that he must, as soon as he has the information which enables him to make his election, give notice to the underwriters that he has so elected. That rule is founded upon 480] two \*grounds: when the assured has once elected to treat the loss as a total loss, the underwriters can insist upon his abiding by the election, so as to enable them to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice, which is entirely different from abandonment, is that he may tell the underwriters at once what he has done, and not keep it secret in his mind, to see if there will be a change of circumstances. There is another reason: the thing in various ways may be profitably dealt with, as the ship was in this case. Therefore, the second reason for requiring notice of abandonment to be given to the underwriters is, that they may do, if they think fit, what in their opinion is best, and make the most they can out of that which is abandoned to them as the consequence of the election which the assured has come to.

(') Law Rep., 6 H. L., 83; 5 Eng. R., 40.

How, then, can the plaintiff say that it was not necessary in the present case to give notice of abandonment?

It is suggested that, if the jury should find that the notice would have been useless, that excuses the assured from giving such notice. It is unnecessary to consider what would be the result if, at the time the assured received notice of those facts which led him to treat it as a constructive total loss, he also knew that the circumstances were such that, if he communicated with the underwriters and waited for their answer before taking any action, the thing insured would cease to exist and be entirely lost. I think so, because, although it was suggested that there was such stringent necessity in this case for the sale of the ship, that if it had not been sold it would have perished, there is no evidence to support the contention that the ship was in this imminent danger.

Therefore, the question must be considered upon the assumption that there being no such stringent necessity for selling the ship to save her from being entirely lost, a jury might possibly find that communicating with the underwriters would have produced no useful result. It was suggested that it followed from *Rankin v. Potter* <sup>(1)</sup> that if the notice of abandonment was of no use to the underwriter, the assured was excused from giving it, but, in my opinion, nothing that was said by the learned Lord who moved the judgment of the House, or by any of the judges, supports that contention. In that case, the policy in question was a policy on \*freight, and at the time the assured [48] received notice of the loss, he also received notice that it was impossible to earn the freight, and they decided that if at the time when the assured received information to enable him to claim for a total loss, he also hears that the thing has been sold or gone out of his power, that does excuse notice of abandonment, but they decided no more than that. There is nothing in the observations of Blackburn, J., which can possibly be construed to mean that, where the assured has in his possession the thing insured at the time when he received notice of the facts, he then is excused from giving notice of abandonment to the underwriters.

On principle, ought we to carry what was laid down in *Rankin v. Potter* <sup>(1)</sup> further than that case has carried it? In my opinion, no. All the grounds upon which the rule requiring notice of abandonment to be given is based apply equally in this case, even although the jury might find that in the ultimate result notice of abandonment would have

<sup>(1)</sup> Law Rep., 6 H. L., 83; 5 Eng. R., 40.

produced no good result to the underwriters. The object is, as I have pointed out before, to communicate to the underwriters that decision at which the assured has arrived at the earliest possible moment, so as to render it impossible for him, having formed that decision, to retract it, and in order that he must not be allowed to run the chance of events, and to abstain from giving notice, and afterwards excuse himself by saying, "If I had given notice the underwriters would have got no benefit from it;" and from the other ground on which notice is required it equally follows that it must not be left to the jury to say whether or no notice would be useful. Suppose, for various reasons, the ship in this case had not been sold for two or three months, it is obvious, if there had been notice to the underwriters, they might have done something, and we must not depart from the general rule laid down for all cases simply because in a particular case a jury might find that notice would have produced no good result. I think, that where the assured at the time he receives the information on which he is bound to make his election has the thing insured in his power or under his control, he is bound to give notice to the underwriters. I give no opinion upon the question which arises 482] when the state of the thing insured is \*such that before the communication could have reached the underwriters it must, so far as human probability goes, have ceased to be in specie.

In my opinion therefore it was necessary that due notice should be given to the underwriters. Was notice given? The facts are that one of the owners of this vessel was at Singapore and had full authority to act for his co-owners. It is shown that he, in a letter of the 7th of February to the master of the ship, does tell him to follow the advice of those who have surveyed the vessel and sell. This owner being at Singapore, received, on the 7th of February, information of the survey which had then taken place, and that survey and that letter which he received on the 7th of February did give him not only all the information necessary to enable him to make his election; but the information upon which, in fact, he did make his election to treat it as a constructive total loss. Then there follows some direction to get a surveyor's opinion whether the ship could or could not, without repairs, come down to Singapore; the captain stated he thought she could not, but the owner wished it to be put in the report. It is said that showed he had not made his election to abandon, and wanted further information. That, however, is not so; for in that letter he is deal-

ing with that vessel as one that was in future to be dealt with only for the benefit of the underwriters, and not by the owners for their own benefit.

There is no evidence as to what notice was given or when it was given, but it seems to have been conceded at the trial that notice was given on the 11th of March. If so, that was the first notice which was given by the assured to the underwriter. If the letter of the 30th of January gave all the necessary information to the owner at Singapore which enabled him to judge whether he would elect to abandon or not, then he ought at once, or within a reasonable time, to have given notice to the underwriters, and not simply to have sent that letter to Europe without any instructions, and to have left it to the agent to decide what he would do. But, at any rate, the letter of the 3d of February, received on the 7th, was a letter which gave the full information. I am of opinion that notice given on the 11th of March would not be given in reasonable time after the 7th of February. I am of opinion that the judgment of \*Lord Coleridge, C.J., was right, and that the question which the Court of Common Pleas thought ought to have been left to the jury ought not to have been left to them.

THESIGER, L.J.: I am of opinion that the judgment of Lord Coleridge, C.J., was right, and should be affirmed. The plaintiff seeks to recover in respect of a constructive total loss. It is impossible, upon the facts which have been admitted at the trial, for him to put his case higher, and, on the other hand, the underwriter, the defendant, does not contend that the facts admitted were not sufficient to entitle the assured to treat the loss which did occur as a constructive total loss. That being so, it was incumbent on the assured to prove one of two things: either that he abandoned and gave notice of the abandonment immediately upon his receiving full information of the loss; that is to say, as soon as he had before him all the materials upon which he might properly be called upon to make his election; or that the circumstances of this particular case were such that they rendered the giving of notice of abandonment useless and unnecessary.

Now, at the trial before Lord Coleridge, C.J., the plaintiff adopted the latter alternative, and it was urged on his behalf that the sale of the vessel, which was the subject of the insurance, upon the 23d of February, was a reasonable and prudent sale; that the communication of the fact of that sale being about to take place could not reach the underwriters in time to enable them to take any advantage of

it, or to give any orders in reference to the vessel, and that consequently the case was within the decision in *Rankin v. Potter* (¹), and therefore that notice of abandonment was not necessary. Lord Coleridge, C.J., assumed, as he was bound for the purpose of the case to assume, that the sale was reasonable and prudent, but held, and I am of opinion rightly held, that notwithstanding that fact it was incumbent upon the assured to give notice of abandonment. Now, in the first place, it is to be observed that at the root of the contention of the assured lies the question of fact, whether or not it was impossible for him to have communicated to the underwriters, in time to enable them to take any advantage of 484] the \*communication, and even upon that point it appears to me, and I should be perhaps prepared so to decide if it were necessary to decide the point, that the assured has failed to establish any such impossibility. Upon the 7th of February he received full materials upon which to exercise his election to abandon. A system of telegraphic communication existed, and as far as one can see had existed for some time between Singapore and London, and it was not unreasonable, or rather it was reasonable, that communication should be made under certain circumstances by the assured to the underwriters. This is made plain by the evidence of the plaintiffs themselves, because in the letter of the 7th of February, written by the firm at Singapore to the master of the vessel, they say that in certain events which are mentioned in the letter, and to which I need not more particularly refer, they propose to telegraph to the underwriters. But it appears to me unnecessary to decide this case on that question of fact, and I will assume for the purpose of the further discussion of the case that it might reasonably be said that the question, whether or not the assured ought to have used the telegraphic communication with the underwriters, was a question of fact which ought to have been left to the jury. But then arises the question whether, assuming that to be the case, the facts proved at the trial bring this case within the decision of *Rankin v. Potter* (¹). Now, in using the words, "within the decision," I do not wish to be misunderstood. I quite admit that this court is equally bound by any principle of law clearly enunciated by the House of Lords and treated by them as the basis of their decision, but admitting that to the full, what is the principle which is to be collected from that case? Putting it as high as it can possibly be put in favor of the plaintiff, it seems to me to come to no more than this, that

(¹) Law Rep., 6 H. L., 83; 5 Eng. R., 40.

when at the time that the assured properly elects to treat a loss as a total loss, a constructive total loss, there is no possibility of the insurers deriving any advantage from the notice of abandonment; in that case the assured need not go through what has been termed the idle ceremony of giving such a notice. I say putting the principle as high as it can be put in favor of the plaintiff, because when the opinions of the learned law Lords in that case are considered \*I think it will be found clearly that the prin- [485 ciple laid down did not even extend as far as I have suggested. I think it would be convenient, while I am upon that point, to refer to two or three passages of the opinions of the Lords as bearing out the view which I have propounded. Lord Chelmsford (at p. 157) says this: "In *Farnworth v. Hyde* (') under similar circumstances of the loss of the ship insured, and of her sale having reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment. This seems to place the rule as to notice of abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters from withholding a notice where it is wholly out of their power to take any steps to improve or alter their position." Stopping at that point of Lord Chelmsford's opinion, it is clear he is not laying down the principle as an absolute principle to be applied to all facts and circumstances, but is laying it down to be applied to the case when at the time the assured received notice of the loss, he also received notice that the subject-matter of the insurance was no longer in specie, and therefore, although there was something to abandon, that is to say, the produce of the sale, there was no part of the matter insured that could by any possibility be abandoned to the underwriters. Then, again, Lord Colonsay (at p. 161) says this: "I think that the reason of the thing tells us that where there is nothing substantially to abandon to the party to whom the notice of the abandonment is given, and he could gain nothing by it, then it is not necessary to give that notice." And Lord Hatherley (at p. 165), after dealing with the argument which had been urged on behalf of the underwriters, to the effect that they were under all circumstances and all states of fact to be the judges whether notice of abandonment could or could not be of any service to them, says: "I apprehend that certainly no authority has been cited to show that this notice of abandonment is to be considered necessary in a case where no such advantage could possibly accrue to the

(') 18 C. B. (N.S.), 835.

underwriters. If the vessel be not really wholly lost, if it be only a constructive total loss, as it is termed (though that is perhaps not a very happy phrase), occasioned by the impossibility of effecting repairs, the cost of which will not exceed the whole value of the \*ship when repaired, then there being something *in esse* to be handed over to the underwriters, it is necessary that they should be informed of this in order that they may have an opportunity of making the best use they can of what remains." Further on he says: "But in this case there is nothing suggested (except one single point which I will notice in a moment) as to any advantage that could have been derived by the underwriters from any such notice of a constructive total loss being given to them on the part of those who had insured." Then it is said there is something to be collected from the language of Blackburn, J., in his opinion to the House of Lords, from which it may be inferred that the principle laid down can be further extended. Now, in the first place, it is to be observed that the opinion of Blackburn, J., delivered to the House of Lords is not a binding authority upon us, and although the opinion is very valuable for the purpose of guiding us, we have to look at the opinions of the Lords, and not the opinions of the judges given to the Lords; but, at the same time, I think I may also say that when the whole opinion of Blackburn, J., is looked at, it does not justify the contention which has been raised on behalf of the plaintiff, and without taking up time by reading passages from that opinion, I would say that it goes no further than the opinions of the Lords themselves; that where at the time that the assured receives notice of the loss and has to exercise his election to abandon, there is no part of the subject-matter of the insurance to abandon, and therefore no possibility of an advantage to the underwriters if they did receive the notice; in that case the assured may be discharged from the onus, which otherwise would lie upon him, of giving a notice of abandonment; and when one considers the lengths to which the principle might be carried if the argument on the part of the plaintiff in this case could be supported, I think that, in the absence of authority, it is impossible to hold that it would be proper to find in favor of that contention. One can see that if at any moment an assured, who is entitled to treat a loss as a constructive total loss, may at the same time absolve himself from the necessity of giving notice of abandonment by selling the vessel, which although a prudent course is not a necessary course, it would lead to the greatest danger of frauds upon the un-



derwriters, and at all events \*to very considerable [487 inconvenience in reference to policies of marine insurance.

Now what are the facts in this case? I have not heard any evidence whatever which has been put before Lord Coleridge, C.J., or which has been put before us, to the effect that there was any absolute necessity for the sale of this vessel, and although it is admitted that the vessel was a constructive total loss in this sense, that the cost of repairs to the vessel would be greater than the value of the vessel when repaired, I cannot trace any evidence to the effect, that if the sale of that vessel had been postponed even for two or three or four months, she would have ceased to exist in specie or that the loss from a constructive total loss would have become an actual total loss. If that be so, then upon principle and authority it appears to me that the plaintiff is not entitled to use the fact of that sale as a reason for excusing himself from giving a notice of abandonment.

Then the only remaining question which has also been argued before us, although it does not appear to have been raised before Lord Coleridge, C.J., at the trial, is, that the plaintiff did, as a matter of fact, elect to abandon within a reasonable time, and did give notice of abandonment to the underwriters also within a reasonable time.

Now, how stand the facts upon that question? For the purposes of the trial, and for the purposes of the judgment of Lord Coleridge, C.J., an imaginary date of giving notice of abandonment, namely, the date of the 11th of March, appears to have been taken by both parties as a datum, but in point of fact no notice was given at any such date, and both parties when arguing before us have gone behind that date; and while on the part of the plaintiff it has been contended that really notice of abandonment was given at an earlier date, and immediately upon the receipt of full information of the loss, upon the part of the defendants it has been urged that no notice of abandonment was given by any earlier communication than the letter of the 27th of February, which was written by the plaintiff's firm at Singapore; and when the other letters, namely, those of the 31st of January and the 7th of February,—which, be it observed, were not letters sent to the agents of the assured in London for the purpose of \*being communicated to the underwriters, [488 but were letters sent to the plaintiff on the record at Zurich;—when the terms of those letters are read and considered, it is obvious that, so far from those being letters suggesting to him the giving notice of abandonment, they were only letters giving him such information as the plain-

tiff's firm at Singapore themselves had, with the statement that he would receive further information, as they themselves received it, and it appears to me clear that, even if the letter of the 27th of February itself can be considered as a notice of abandonment, that at all events is the first notice which can be said to have been given to the underwriters.

Let us examine the matter further. On the 7th of February the plaintiff's firm at Singapore had full information as to the loss and all the materials upon which they might perhaps have relied to elect whether they would abandon, in other words, whether they would treat the loss which had been sustained as a partial loss or as a constructive total loss. I need not refer more in detail to the letter written by the Singapore firm to the master of the ship. I would merely say that the whole purport and scope of that letter shows that while they were considering the question of a complete condemnation of the vessel with reference to the further question, whether the vessel should be taken to Singapore and there repaired on behalf of the underwriters, so far as regards the question of constructive total loss, the plaintiff's firm themselves considered that they had had full information as to the nature of the loss, and such information as they were prepared to act upon in treating that loss as a constructive total loss. If that be so, then the plaintiff is in this dilemma, either he elected to abandon on the 7th of February, or concurrently with the order for sale, or the sale on the 23d of February, or not till after that sale. If he elected to abandon on the 7th, then no facts have been proved on the part of the assured to account for the delay between the 7th of February, when the assured elected to abandon, and the 27th of February, when for the first time he sent forward the notice of abandonment. On the other hand, if we take the date of the 23d of February as the date of the election to abandon, and *à fortiori* if we take any date after the sale on the 23d of February, then the plaintiff is in this difficulty, the assumption is \*that he had full materials upon which to elect to abandon upon the 7th of February, therefore he was called upon to elect to abandon on that day, and if he did not elect to abandon till the 23d, still more if he did not elect to abandon till a later day, then that election to abandon was too late, and if the election to abandon only took place after the sale, then it follows that the sale was a determination of their election as against the idea of the loss being treated as a constructive total loss.

For these reasons it appears to me that the onus of proof being upon the plaintiff, he failed to give any evidence to

Charles v. Taylor.

1878

show that he elected to abandon, or gave notice to abandon within a reasonable time, and as he gave no evidence to justify Lord Coleridge, C.J., in leaving the matter to the jury to decide, Lord Coleridge's, C.J., judgment was right, and the court below were wrong in holding that the matter should go down for a new trial.

*Judgment reversed.*

Solicitors for plaintiff: *Parker & Clarke.*

Solicitors for defendant: *Hollams, Son & Coward.*

[3 Common Pleas Division, 492.]

June 3, 1878.

[IN THE COURT OF APPEAL]

\*CHARLES V. TAYLOR, WALKER & CO. [492]

*Master and Servant—Common Employment—Concealed Danger.*

The defendants were brewers, having upon the river T. a wharf, where coals were discharged to be used in their business. The plaintiff was hired by A., to assist in unloading a barge at the wharf of the defendants. The plaintiff and A., with other men, formed a gang, the members of which were paid by the defendants, at the rate of 1s. 9d. for every ton of coals discharged; one of the men was to receive from the defendants the money due for unloading the barge and to distribute payment amongst them; the defendants alone had power to dismiss the plaintiff. Whilst the plaintiff was engaged in unloading the barge, a servant of the defendants', who was engaged in moving some barrels, negligently let one of them slip upon an upraised flap, which fell and caused the plaintiff injury. The plaintiff had frequently been at the spot when the barrels were being moved:

*Held*, that the defendants were not liable to compensate the plaintiff for the injury sustained by him; for A. held the position of a foreman and not of a contractor, and the plaintiff was servant to the defendants, and he was engaged in a common employment with the servant, by whose negligence the injury happened, and there was no concealed danger.

**ACTION** to recover damages for bodily injury caused by the negligence of the defendants' servants.

The cause came on for trial during the Hilary Sittings (Feb. 27), 1878, in Middlesex, when it appeared that the defendants were \*brewers carrying on business at Lime- [493] house, and that their brewery adjoined the river Thames; for the purposes of their business they used coals brought in barges to a wharf belonging to them. The plaintiff was one of a gang of "lumpers," that is, of men who undertook to unload the barges upon being paid by the "lump," that is, as for piece-work; the rate of payment was 1s. 9d. per ton; the money due to the gang was paid by the defendants to one of the gang, who afterwards distributed it amongst them. Upon the day of the accident, whereby the

1878

Charles v. Taylor.

plaintiff was injured, he had been hired as a "lumper" by a laborer in the employ of the defendants, named Ansell, to unload a barge of coals at the defendants' wharf. At the moment of the accident, the plaintiff was carrying a sack of coal upon his back on to the wharf up the stairs covered by the flap which fell upon him. The remaining facts of the case are sufficiently stated in the judgment of Lopes, J., hereafter set out. The defendants consented that the damages should be assessed against them at £150 if the action should be in law maintainable.

*Kemp, Q.C., and Williams, for the plaintiff.*

*Day, Q.C., and E. Baggallay, for the defendants.*

March 6. Judgment was delivered by

LOPES, J.: This was an action brought to recover compensation on account of the defendants' negligence. It appeared that the plaintiff on the 19th of February, 1876, was employed in discharging at the defendants' wharf some coals to be used in their brewery, and whilst he was so engaged, a servant of the defendants, who was moving the defendants' barrels, let a barrel slip from a pulley, which came across a flap, broke the chain supporting the flap, and caused the flap to strike the plaintiff, whereby he was seriously injured. The plaintiff had frequently before been at the same spot when the barrels were being moved. It appeared that the plaintiff had been hired to discharge the coals by a laborer called Ansell, in the defendants' employ; the defendants, however, paid the plaintiff, and the defendants only could dismiss him. The defendants consented to a verdict for £150. Judgment was reserved, and it was agreed that I might draw inferences of fact.

494] \*The only question is, whether the nature of the plaintiff's employment was such as to make him and the servant, by whose negligence he suffered, servants in a common employment within a rule, which exempts the employer from responsibility to his servant for the consequences of the negligence of a servant in a common employment.

It was argued on the part of the plaintiff, that he was in the employment of Ansell and not of the defendants. In support of this contention, *Abraham v. Reynolds* (1) was relied upon. The present case is very distinguishable; the plaintiff in that case was the servant of the carrier and not of the defendants. This case is more like *Wiggett v. Fox* (2) where the defendants, have contracted for the erection of the Crystal Palace, entered into agreements with five other

(1) 5 H. & N., 143.

(2) 11 Ex., 832; 25 L. J. (Ex.), 188.

persons for the erection of portions of the work, and the sub-contractors engaged the services of the deceased Wiggett. But it was proved that the deceased was paid by the defendants, and the defendants had power to dismiss him though engaged by the contractor; it was held that the plaintiff was the servant of the defendants. The present case is a much stronger case, for there is no pretence for saying that Ansell was a contractor. It is clear that the plaintiff was in the employ of the defendants, and not of Ansell.

With regard to the question of common employment I am unable to distinguish this case from *Morgan v. Vale of Neath Ry. Co.* ('). I think that the plaintiff in accepting an employment to work at the wharf, where the barrels were being moved, where he had often in similar circumstances worked before, accepted an employment which of necessity must have exposed him to risk from the carelessness of those moving the casks in the vicinity of the flap, and that he must be considered as between himself and his employers to have taken upon himself that risk.

There will therefore be judgment for the defendants.

The plaintiff appealed.

June 3. *Bucknill*, for the plaintiff, contended first, that the plaintiff at the time of receiving the injury was not servant to the defendants, and as to this cited *Wiggett v. Fox* ('); *Murray v. Currie* ('); *Rourke v. White Moss Colliery Co.* ('); *Swainson v. North Eastern Ry. Co.* ('); secondly, that the plaintiff was not a fellow servant to, and was not engaged in a common employment with, the defendants' servant, by whose negligence the injury happened, and as to this, he cited *Bartonshill Coal Co. v. McGuire* ('); *Morgan v. Vale of Neath Ry. Co.* ('); *Wilson v. Merry* ('); *Smith v. Steele* ('); *Lowell v. Howell* ('); *Woodley v. Metropolitan District Ry. Co.* ('); thirdly, that the danger to which the plaintiff was exposed was concealed, for he could not be supposed to have contemplated, at the time of entering upon the employment, the accident which actually happened.

*Day, Q.C.*, and *Erskine Pollock*, for the defendants, cited *Abraham v. Reynolds* ('').

BRETT, L.J.: The plaintiff's counsel has argued this case

(<sup>1</sup>) Law Rep., 1 Q. B., 149.

(<sup>2</sup>) 11 Ex., 832; 25 L. J. (Ex.), 188.

(<sup>3</sup>) Law Rep., 6 C. P., 24.

(<sup>4</sup>) 2 C. P. D., 205; 20 Eng. R., 469.

(<sup>5</sup>) 3 Ex. D., 341.

(<sup>6</sup>) 3 Macq., 300.

(<sup>7</sup>) Law Rep., 1 Sc. Ap., 326.

(<sup>8</sup>) Law Rep., 10 Q. B., 125; 11 Eng. R., 194.

(<sup>9</sup>) 1 C. P. D., 161; 16 Eng. R., 501.

(<sup>10</sup>) 2 Ex. D., 384.

(<sup>11</sup>) 5 H. & N., 143.

with great ability, nevertheless we must uphold the judgment of Lopes, J.

As to the first point, whether the plaintiff was servant to the defendants, I wish to remark, that by agreement of the parties the facts were left to Lopes, J., in order that he, acting as a jury, might find what they were. It is not for us to consider whether we should have found as he did, but whether his finding is so far wrong that we ought to set it aside; and I think that we ought not to dissent from it. Ansell swore that he was a "lumper" working at the wharves along the river side, and that the terms agreed upon between himself and the defendants were that he should get the barge discharged and should be paid at the rate of 1s. 9d. for every ton that was unloaded, he managing everything necessary to perform that laborious employment. He selected, as he liked, the men who were to work under him; but they were to work as if he were foreman: such was the nature of the employment, that he could not dismiss any workman without reference to the defendants. Lopes, J., 496] was justified in saying that Ansell \*was not a contractor, but a servant to the defendants; he was paid not as master-workman, but as foreman. I think Lopes, J., right as to the nature of Ansell's employment as "lumper," and it follows that the plaintiff was servant to the defendants; the case before us is one where a servant has been injured by a servant of the same employers.

The second point was, that although the plaintiff might be a servant to the defendants, nevertheless he was not a fellow servant with the man by whose negligence the accident happened. Many cases have been cited to us for the purpose of showing what is the principle upon which, if a servant is guilty of negligence causing bodily harm, his master is held liable to a stranger, but not to a servant engaged in a common undertaking with that other servant. It is not for us sitting as judges to criticise the law; but we must sometimes look out for the principles upon which it is founded. Many views upon the subject before us have been expressed; they are certainly not identical, although they may not be inconsistent with each other. Upon the present occasion it is unnecessary to ascertain the true principle, but in general the master is not liable. I shall now enunciate one principle relating to the question; I do not say there may not be more. It is this: when the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing as part of the work

which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other. This is a formula, though not the only one. Let me apply this formula to the facts before us; the service of the plaintiff would compel him to work at the same time and in the same place as the servant engaged in moving the barrels, so that the negligence of the latter in moving the defendants' barrels might injure the plaintiff whilst engaged in unloading the barge; the negligence of the one in his work might cause injury to the other whilst employed in his work. I think that Lopes, J., was right in holding that the defendants, who were the employers of both the plaintiff and the servant who was guilty of negligence, were not liable for the accident; it was not necessary, in order to \*exempt [497 the defendants, that the two servants should be engaged in the same kind of work.

I think that this is not a case of concealed danger.

COTTON, L.J.: I also think that the appeal fails.

The first point to be determined is, whether the plaintiff was servant to the defendants; upon this I had felt some hesitation; but we have not to find the facts for the first time. Lopes, J., has found that the plaintiff was the defendants' servant; I have some doubt how I should have found this question: but the witnesses are not before us, and we cannot judge as to their accuracy and credibility, and therefore I think that we ought not to interfere with the finding. We must start with the case upon the footing that the plaintiff was in the defendants' service.

As to the second point, whether there was a common employment, I wish to remark that although there may be cases where the distinction between what is and what is not a common employment may be hard to determine, it is unnecessary to consider the question now. In the case before us the plaintiff was employed in the business of the brewery, and it must be taken that the defendants as masters pointed out that they would engage other servants, whose acts as between them and the plaintiff were not to be considered as the defendants'. The plaintiff knew that other persons would be employed in carrying on the business of the brewery; barrels are used for the purposes of brewing, and the servant, by whose negligence the injury was inflicted, was at the time of the accident engaged in the work of the brewery. According to the authorities, in order to exempt the master from liability, it is unnecessary that the employment should be of the same nature, if there is a

common object, and if it must be taken that for the purpose of effecting that object the master must employ other servants. I think, therefore, that the plaintiff and the servant who caused the misfortune were engaged in a common employment.

A third point has been argued, namely, that the defendants are not protected from the liability because danger is not apparent. If in order to exempt them it were necessary to hold that the danger must be foreseen by the servant, upon the evidence I should be inclined to come to the conclusion that the plaintiff did \*foresee it; at all events if he did not contemplate the accident which actually happened, he might have foreseen it: it would therefore be a risk which he took upon himself. But the decisive answer to this point is, that according to English law, where a servant goes into a service in which he knows that other servants will be employed, he must be assumed to have undertaken that he will not consider the acts of his fellow servants as the acts of his master. Whether this principle is good or bad, it can be abolished only by the power of the Legislature; we must adhere to what has been laid down in former decisions.

THESIGER, L.J.: In my opinion the judgment of Lopes, J., must be affirmed. It seems to me to be a question of fact whether the plaintiff was servant to the defendants: if that had been answered in the negative, I should have thought this action maintainable; but the evidence produced upon behalf of the plaintiff was insufficient to entitle him to succeed. According to the statements of Ansell, he himself was a servant to the defendants, if not permanently, at least upon the occasions when he was employed by them. The laborers employed by him were not paid by him, but by the defendants in a lump sum, and he could not discharge them without referring to the defendants. Certainly I cannot say that Lopes, J., drew a wrong conclusion. It has been urged that an employment is "common" within the meaning of the rule exempting employers only when the immediate object of the work in which the servants are engaged is the same; but I think that this argument is answered by the principles laid down in *Morgan v. Vale of Neath Ry. Co.* (1), and it follows from this case that where there is one common general object, in attaining which a servant is exposed to risk, he is not entitled to sue the master if he is injured by the negligence of another servant whilst engaged in furthering the same object. The facts in

(1) *Law Rep.*, 1 Q. B., 149.



Charles v. Taylor.

1878

that case are not in principle to be distinguished from those in the case before us. The plaintiff and the man by whose negligence he was injured were engaged in a common object, namely, the carrying on of the business of a brewery; and it does not matter that they were not engaged in the same kind of work. I do not think it material to ascertain whether in point \*of fact the plaintiff was aware that [499 the flap might fall upon him; according to the rule of law it was a risk which he must be taken to have contemplated.

*Judgment affirmed.*

Solicitor for plaintiff: *H. A. Lovett.*

Solicitors for defendants: *Gellatly, Son & Warton.*

See Moak's Underhill on Torts, 45-63; 21 Eng. Rep., 519 note; 2 Dillon, 263 note; 9 Federal Reporter, 341 note; 5 Southern Law Rev., 200, 380; 14 Amer. Law Rev., 295 note; Thompson on Negligence, 20 Amer. Law Reg. (N.S.), 728 note.

A contract between employer and employe, whereby the employe, in consideration of the employment, agrees to release and discharge his employer from all damages on account of accident or death to the employe, caused by the negligence of his employer or co-employes, is void as against public policy: *Roesner v. Herman*, 8 Federal Rep., 789.

Where a surety for a contractor was to protect himself from liability, under his suretyship, carrying on the work, held to be a question for the jury whether he was the employer so as to be liable to an employe for an injury received from a defective scaffolding provided for workmen: *Manning v. Hogan*, 9 Weekly Dig., 237, 78 N. Y., 615.

A corporation which lets a dry dock to a person who uses it in his own business of repairing a vessel, is not liable for injuries to a workman employed by him, caused by a defective plank in staging built by him for the purpose of such repairs, where, though the planks for the staging were furnished by the corporation, yet they formed no part of the dry dock let, and the person using them for his staging had the right to accept or reject them or any of them: *Mulcahy v. N. Y. Floating Dock Co.*, 8 Daly, 93.

Legal privity may sometimes exist between one contracting party and the servants of the other, as where the ser-

vants are exposed to risk from being obliged to work upon the former's premises under an arrangement which binds him to keep the premises in safe condition.

Where a mining corporation contracting for the removal of ore reserves to itself such arrangements as are necessary for the protection of workmen, it is liable for such injuries as happen to employes of the contractors without the fault of the employes: *Lake Sup. Iron Co. v. Erickson*, 39 Mich., 492.

But a county is not liable to a convict confined in its penitentiary and injured by a circular saw: *Almango v. Supervisors*, 25 Hun, 551. Nor a contractor for negligence of a convict: *Cunningham v. Bay State*, Id., 210.

A person engaging in the service of a railway company as an engine driver, with full knowledge of the dangers incident to the service, who receives an injury while in the discharge of his duties by a collision with a train of another company using the same part of the road under a lease from his employer, through the negligence and recklessness of the employes of the lessee company in running the train in violation of the reasonable rules of the lessor company, cannot recover damages of the company employing him, such an accident being one of the ordinary perils of the service, and not attributable to any negligence on the part of the employer: *Clark v. C. B. & Q. R. R. Co.*, 92 Ill., 43.

Where two railway companies occupy and use a portion of the same road as a common track, the one as owner thereof and the other as lessee, under proper rules and regulations as to the joint use

so as to secure care and safety, the lessor company, in the employment of servants to operate its trains over such road, does not impliedly contract with such servants that the employees of the lessee company will observe strictly the rules adopted to secure safety in the running of trains over the common road, and will not be held liable to a servant for an injury caused by the negligence of the servants of the lessee company: *Clark v. C. B. & Q. R. R. Co.*, 92 Ills., 43.

The master's liability arises from the fact that he subjects his servant to dangers which, in good faith, he ought to provide against; but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty.

**Illinois:** *Chicago, etc., v. Abend*, 7 Bradw., 130.

**Pennsylvania:** *Pittsburg, etc., v. Sentmyer*, 92 Penn. St. R., 276.

The master agrees, by implication of law, not to subject the servant he employs to extraordinary or unusual perils or dangers.

**United States, Circuit and District:** *Graville v. Minneapolis, etc.*, 10 Fed. Repr., 711.

If there exist facts known to the employer and unknown to the employee, increasing the risk of such employment beyond its ordinary hazards, the employer is bound to disclose such facts to his employee; otherwise he will be liable, as for negligence, in case of injury to the latter, resulting from such unusual risks.

**Massachusetts:** *Walsh v. Peet Valve Co.*, 110 Mass., 23.

**Michigan:** *Swoboda v. Ward*, 40 Mich., 420.

**Missouri:** *Dowling v. Allen*, 6 Mo. App., 195.

**United States, Circuit and District:** *McGowan v. La Plata, etc.*, 2 Col. Law Repr., 199.

**Wisconsin:** *Steffen v. Chicago, etc.*, 46 Wisc., 262, 265.

It is the duty of a railway company to make such regulations or provisions for the safety of its employees, as will afford them reasonable protection against the dangers incident to the performance of their respective duties: *Lake Shore, etc., v. Le Valley*, 36 Ohio St. R., 221.

See *Slater v. Jewett*, 85 N. Y., 61.

If an employee, with a full knowledge of an habitual and continued negligence of his employer or his superior fellow employe in some particular matter, acquiesces therein and continues in the service of the company without any objections or effort toward a correction of the neglect, he thereby waives his right against the company and takes the risk upon himself.

**Ohio:** *Lake Shore, etc., v. Knittal*, 35 Ohio St. R., 468.

If an employee suffer an injury from a violation of his employer's instructions or directions, he cannot recover.

T., an engineer on the M. & C. R. R., was in charge of a train that ran off at a switch and seriously injured him. At the time of the accident the train was running at the rate of ten miles an hour. The rules of the company required all trains to slacken their speed to six miles an hour when passing a switch. Held, that T., the engineer, directly contributed to the accident by which he was injured and could not recover damages for his injury: *Memphis, etc., v. Thomas*, 51 Miss., 637; *Wolsey v. Lake Shore, etc.*, 33 Ohio St. R., 227.

See *Central, etc., v. Mitchell*, 63 Geo., 173.

Where a servant enters upon employment, from its nature necessarily hazardous, he assumes the usual risks and perils of the service, and also those risks which are apparent to ordinary observation.

**Arkansas:** *Little Rock, etc., v. Duffey*, 35 Ark., 602.

**Illinois:** *T. W., etc., v. Black*, 83 Ills., 112; *Pennsylvania, etc., v. Lynch*, 90 id., 333; *Clark v. Chicago, etc.*, 92 id., 43; *Chicago, etc., v. Scheuring*, 4 Bradw., 533.

But see *Chicago, etc., v. Russell*, 6 West. Jur., 193, 91 Ills., 298.

**Indiana:** *Lake Shore v. McCormick*, 74 Ind., 440.

**Michigan:** *Swoboda v. Ward*, 40 Mich., 420.

**Missouri:** *Smith v. St. Louis, etc.*, 69 Mo., 32, 14 Am. L. Rev., 289, 295 n.; *Porter v. Hannibal, etc.*, 71 Mo., 66.

**New York:** *De Forest v. Jewett*, 25 Alb. L. J., 297, affirming 23 Hun, 490; *Leonard v. Collins*, 70 N. Y., 90.

**Ohio:** *Lake Shore, etc., v. Knittal*, 33 Ohio St. R., 468.

**Pennsylvania:** Green, etc., v. Bresmer, 97 Penn. St. R., 103; Pittsburg, etc., v. Sentmyer, 92 id., 276.

**United States, Circuit and District:** Graville v. Minneapolis, etc., 10 Fed. Repr., 711; Kielly v. Belcher, 3 Sawyer, 437.

**Wisconsin:** Steffen v. Chicago, etc., 46 Wisc., 265; Howland v. Milwaukee, etc., 11 N. W. Repr., 529.

The law will presume, within limits, that every one has knowledge of certain destructive forces in nature, and accepts employment with reference to them—as that fire will burn, water drown, the law of gravitation, etc. But many scientific facts tending to endanger life are not within the intelligence of ordinary men. A laborer employed to remove hot slag from a furnace in proximity to water, will not be presumed to know the dangers which may result from the explosion sure to be caused by the contact of the hot slag and the water. It is not so much a question whether the party injured has knowledge of all the facts in his situation, as whether he is aware of the dangers that threaten him: McJowan v. La Plata, etc., 2 Col. Law Repr., 190, U. S. Circuit Court, Hallett, J.; Walsh v. St. Paul, 27 Minn., 367.

Knowledge of danger not only implies a knowledge of the condition of the machinery arising from its being open to inspection, but an understanding of the danger resulting from that condition, and the question of the employe's knowledge of the danger should not be excluded from the jury: Glover v. Gray, 9 Bradw., 329.

Where a servant is injured in the ordinary course of his employment, after having had a fair opportunity to become acquainted with the risks naturally and reasonably incident thereto, he will be deemed to have contracted to submit to such risks, and has therefore no right of action against his master for the injury done him.

**Illinois:** T. W., etc., v. Black, 88 Illinois, 112; Pennsylvania, etc., v. Lynch, 90 id., 333; Clark v. Chicago, etc., 92 id., 43; Chicago, etc., v. Scheuring, 4 Bradw., 533; Lake, etc., v. Roy, 5 id., 82; Price v. Henagan, Id., 234.

**Iowa:** Perigo v. C., etc., 52 Iowa, 276.

**Massachusetts:** Lovejoy v. Boston, etc., 125 Mass., 79.

**Michigan:** Quincy, etc., v. Kitts, 42 Mich., 34.

But see Swoboda v. Ward, 40 Mich., 420.

**Missouri:** Smith v. St. Louis, etc., 69 Mo., 82, 14 Am. Law Rev., 289, 295 note; Porter v. Hannibal, etc., 71 Mo., 66.

See Bridges v. St. Louis, etc., 6 Mo. App., 389; McMillan v. Union, etc., Id., 434.

**New York:** De Forest v. Jewett, 25 Alb. L. J., 297, affirming 23 Hun, 490; Plank v. N. Y. Cent., 60 N. Y., 607, as corrected in De Forest v. Jewett, 25 Alb. L. J., 297; Leonard v. Collins, 70 N. Y., 90; Gibson v. Erie, 63 id., 449.

See McMahon v. Port Henry, etc., 24 Hun, 48; Hawley v. Northern, etc., 82 N. Y., 370, 17 Hun, 115.

**Pennsylvania:** Green v. Bresmer, 97 Penn. St. R., 103; Phila., etc., v. Schertle, Id., 450.

**Rhode Island:** Kelly v. Silver, etc., 12 R. I., 112.

**Texas:** International, etc., v. Doyle, 49 Tex., 190.

**Victoria:** Litton v. Thornton, 7 Vict. L. R. (Law), 4.

**Wisconsin:** The case of a sailor obliged to obey the orders of a superior seem to be an exception to the rule: Thompson v. Hermann, 47 Wisc., 602.

It is not contributory negligence for an employe, who is in doubt about the safety of the place where he has to work, to defer to the opinions and assurances of those who are supposed to know, and from their position are bound to have special knowledge as to whether it is safe or not: Lake, etc., v. Erickson, 39 Mich., 492, 18 Am. Law Reg. (N.S.), 28, 35 note.

But see Leonard v. Collins, 70 N. Y., 91; O'Sullivan v. Victoria, etc., 44 U. C. Q. B., 128.

Defendant leased to one L. a floor in a building owned by him, furnished with steam power by means of an upright shaft which had no guard. L. fitted it up, and placed a partition near the shaft. Plaintiff, an employe of L., passed between the shaft and partition, when her clothes were caught by the revolving shaft and she was injured. Held, that L. took the premises as they were, and that plaintiff, going into his service at that place, took the

1878

Charles v. Taylor.

risk of the situation ; that defendant could not be required to change the structure of the premises, except upon some new agreement, or be held liable to an employe of L. for an injury which could not have happened but for that relation : *Ryan v. Wilson*, 1 N. Y. Cond. Rep., 188; S. C., 13 Weekly Dig., 573; *Cagney v. Hannibal*, etc., 69 Mo., 416.

It is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant ; or where, as in the case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus acting in his stead.

**New York :** *Crispin v. Babbitt*, 81 N. Y., 516, 37 Am. R., 524; *Heiner v. Heuvelman*, 45 N. Y. Superior Court R., 88.

**Nova Scotia :** *Campbell v. General*, etc., 1 Nova Scotia Dec., 415.

Where the master abdicates the control and management of certain work in favor of an employe, and gives him full discretion in regard thereto, he is liable for the neglect of such employe in the performance thereof to the same extent that he would be liable for his own neglect ; and this, though the party injured thereby and seeking redress was also employed by him as a workman engaged in the same matter, and under the control of such employe. This rule is not affected by the fact that the master has exercised due care in the selection of the person assigned to said duty.

**Massachusetts :** But see *Zeigler v. Day*, 123 Mass., 152.

**Michigan :** *Quincy, etc., v. Kitts*, 42 Mich., 34.

**Missouri :** But see *Marshall v. Schniker*, 63 Mo., 308.

**New York :** *Heiner v. Heuvelman*, 45 N. Y. Super. Ct. R., 88.

A master may, among other duties, delegate to another the duty of selecting fellow workmen or servants. In such a case the master's obligation is limited to the exercise of reasonable care in selecting a competent person for such service.

**California :** *Collier v. Steinhart*, 51 Cal., 116.

**Canada, Upper :** *Wilson v. Hume*, 30 U. C. Com. Pl., 542.

A master is not responsible to an employe for the negligent act of a competent and proper foreman, to whom there has been no delegation of power and control of the business ; or a branch thereof ; but who is simply charged with special duties, performing them under the direction of the master, the latter combining general control and supervision.

**Massachusetts :** *Zeigler v. Day*, 123 Mass., 152; *O'Connor v. Roberts*, 120 id., 227.

**New York :** *Crispin v. Babbitt*, 81 N. Y., 516, 37 Am. R., 524.

See *Heiner v. Heuvelman*, 45 N. Y. Super. Ct. R., 88.

The liability of a master for an injury to an employe, occasioned by the negligence of another employe, does not depend on the grade or rank of the latter, but upon the character of the act, in the performance of which the injury arises.

If the act is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance ; but if the act is one pertaining only to the duty of an operative, the employe performing it, whatever his rank or title, is a mere servant, and the master is not liable to a fellow servant for its improper performance : *Crispin v. Babbitt*, 81 N. Y., 516, 37 Am. R., 521, 524 n.; *Cone v. Delaware, etc.*, 81 N. Y., 206; *Cumberland, etc., v. Moran*, 44 Md., 283; *Cumberband, etc., v. Hogan*, 45 id., 229; *Berea, etc., v. Kraft*, 31 Ohio St. R., 287; *Heiner v. Heuvelman*, 8 N. Y. Weekly Dig., 17; *Booth v. Boston, etc.*, 73 N. Y., 38; *Vantrain v. St. Louis, etc.*, 8 Mo. App., 538; *Chicago, etc., v. Morand*, 93 Ills., 302; *Kain v. Smith*, 25 Hun, 146.

So where a superior signaled an engineer to start the train, by which one coupling cars was injured : *McCoaker v. Long Island, etc.*, 84 N. Y., 77.

That the negligent servant is superior in authority, or an overseer of the one injured, does not take the case out of the rule, that a master is not liable to one servant for injuries caused by the negligence of a co-servant in the same common employment.

**California :** *Collier v. Steinhart*,

51 Cal., 116; McLean v. Blue Point, etc., Id., 255.

**Illinois:** Chicago, etc., v. Scheuring, 4 Bradw., 533.

**Iowa:** Peterson v. Whitebreast, etc., 50 Iowa, 678.

**Maine:** Blake v. Maine Central, 70 Maine, 60.

**Massachusetts:** Zeigler v. Day, 123 Mass., 152; O'Connor v. Roberts, 120 id., 227; Holden v. Fitchburg, etc., 129 id., 268.

**Michigan:** Quincy, etc., v. Kitts, 42 Mich., 34.

**Minnesota:** Brown v. Winona, etc., 27 Minn., 162; Walsh v. St. Paul, etc., Id., 370.

**Missouri:** Marshall v. Schniker, 63 Mo., 308.

See Dowling v. Girard, etc., 14 Cent. L. J., 92.

**New York:** Crispin v. Babbitt, 81 N. Y., 516, 37 Am. R., 524; Slater v. Jewett, 85 N. Y., 61; McCosker v. Long Island, etc., 84 id., 77, reversing 21 Hun, 500; Gibson v. Northern, etc., 22 Hun, 289.

**Nova Scotia:** Campbell v. General, etc., 1 Nova Scotia Dec., 415.

**Ohio:** In this state a master is held liable for the negligence of a superior servant: Berea, etc., v. Kraft, 31 Ohio St. R., 287; Pittsburgh, etc., v. Lewis, 33 id., 196; Pittsburgh, etc., v. Ranney, 2 Ohio L. J., 445.

**Pennsylvania:** National, etc., v. Bedell, 28 Pittsb. Leg. J., 262, and cases cited.

**Texas:** H., etc., v. Willis, 53 Tex., 318.

The fact that one employe upon a railroad is hired and discharged by one superior agent, and another by another, does not affect the relation of the employes to each other as fellow servants: Slater v. Jewett, 85 N. Y., 61.

In *Illinois*, the rule as to who is a fellow servant is quite peculiar, and this fact should be remembered in considering cases in that State: Chicago v. Moranda, 93 Ills., 302; Keilley v. Belcher, etc., 3 Sawyer, 437; Halton v. Daly, 4 Bradw., 25; Chicago, etc., v. Bliss, 6 id., 411.

The master is not liable for the negligence of a co-employe not a superior in the proper sense of the term.

**California:** McDonald v. Hazeltine, 53 Cal., 35.

**Georgia:** McDade v. Georgia, etc., 60 Geo., 119.

**Illinois:** Chicago, etc., v. Moranda, 93 Ills., 302; Maltez v. Ohio, etc., 85 id., 500; Chicago, etc., v. Scheuring, 4 Bradw., 533; Kranz v. White, 8 id., 583.

**Indiana:** Gormley v. Ohio, etc., 72 Ind., 31.

**Iowa:** In this State, by statute, a railroad company is liable for negligence of a co-servant: Pyne v. Chicago, etc., 11 Cent. L. J., 55.

**Massachusetts:** Morse v. Glendon, 125 Mass., 282; Killea v. Faxon, Id., 485; Kelly v. Boston, etc., 128 id., 456; Curran v. Merchants, etc., 130 id., 374.

**Michigan:** Quincy, etc., v. Kitts, 42 Mich., 34.

**Mississippi:** M., etc., v. Thomas, 51 Miss., 637.

**New York:** Gibson v. Northern, etc., 22 Hun, 289.

**Nova Scotia:** Campbell v. General, etc., 1 Nova Scotia Dec., 415.

**Ohio:** Kumlser v. Junction, etc., 33 Ohio St. R., 151.

**United States, Circuit and District:** Graville v. Minneapolis, etc., 10 Fed. Repr., 711.

**Wisconsin:** The common law rule is changed in this State so far as employes of a railroad are concerned: Dittmer v. Chicago, etc., 47 Wisc., 138.

The rule that an employe cannot recover for negligence of a co-servant, is qualified by the exception that the injury must have occurred by the negligence of a co-servant while managing good and suitable machinery, and that the machinery was not defective under circumstances to render the master liable for furnishing defective machinery: Cone v. Delaware, etc., 81 N. Y., 206, 208-9.

Where an employer furnished to his workmen, who were all competent and fit persons for the employment, a derrick in all respects complete and in good condition. The derrick had from time to time during the progress of the work to be moved, and owing to one of the workmen having insecurely fastened a guy-rope attached to and forming a part of the derrick, it fell and killed plaintiff's intestate, who was one of the workmen engaged in doing the

1878

Charles v. Taylor.

work. Held, the employer was not liable: *Marvin v. Muller*, 25 Hun, 163.

As to who are fellow servants and who not, see 13 Cent. L. J., 406.

An employe charged with the duty of inspecting cars, and a brakeman using such cars, are not co-employees: *Braun v. C. R.*, etc., 53 Iowa, 595; *Gibson v. Northern*, etc., 22 Hun, 289.

*The following have been held to be co-servants:*

A section man and a roadmaster: *Brown v. Winona*, etc., 27 Minn., 162.

A laborer in unloading freight and a superior over him: *Walsh v. St. Paul*, etc., 27 Minn., 370.

Superintendent of a factory and a laborer: *Crispin v. Babbitt*, 81 N. Y., 516, 37 Am. R., 521.

Yardmaster and coupler of cars: *McCosker v. Long Island*, etc., 84 N. Y., 77, reversing 21 Hun, 500, 59 How., 258; *Chicago*, etc., *v. Scheuring*, 4 Bradw., 533; *Marquette v. Joutagon*, 28 Mich., 289.

One who superintends the putting up of a staging, and a laborer assisting: *Killea v. Faxon*, 125 Mass., 485.

A roadmaster turning a switch and an engineer and fireman: *Walker v. Miller*, 128 Mass., 8.

A conductor and an engineer: *Slater v. Jewett*, 85 N. Y., 61.

*Contrà*: *Ross v. Chicago*, etc., 8 Fed. Repr., 544.

A railway engineer and a brakeman: *H.*, etc., *v. Willis*, 53 Tex., 318.

A car inspector and master mechanic and an assistant yardmaster: *Kidwell v. Houston*, etc., 3 Woods, 313.

Superintendent and a laborer, though superintendent paid by a part of the profits: *Zeigler v. Day*, 123 Mass., 152.

Superintendent who employs engineer, and a laborer injured by negligence of the engineer: *Collier v. Steinhart*, 51 Cal., 116.

Foreman and laborers engaged in blasting: *McLean v. Blue Point*, etc., 51 Cal., 255.

An engineer of a railway train and a laborer riding during his work or going or returning thereto: *Kumler v. Junction*, etc., 33 Ohio St. R., 150; *Howland v. Milwaukee*, etc., 11 N. W. Repr., 529, Supreme Court, Wisc.

An engineer and a fireman: *Pittsburgh*, etc., *v. Lewis*, 33 Ohio St. R., 196.

An engineer and a brakeman: *Pittsburgh*, etc., *v. Ranney*, 2 Ohio L. J., 445.

Yardmaster, head-brakeman and car-repairers: *Besel v. N. Y. Central*, 71 N. Y., 171.

Locomotive engineer and a coupler of cars: *Valtez v. Ohio*, etc., 85 Ills., 500.

A detective employed to watch or arrest parties and an engine driver: *Pyne v. Chicago*, etc., 11 Cent. L. J., 55.

One widening track and a brakeman: *Holden v. Fitchburg*, etc., 129 Mass., 268.

*The following have been held not to be co-servants:*

A foreman superintending the repair freight cars standing on the track, and a workman under a car moved without notice or warning to him: *Lake Shore*, etc., *v. Le Valley*, 36 Ohio St. R., 221.

A conductor and an engineer under special rule applying to one of them only: *Ross v. Chicago*, etc., 8 Fed. Repr., 544.

*Contrà*: *Slater v. Jewett*, 85 N. Y., 61.

Laborers who make a cavity in repairing track and brakeman coupling cars. This case went on the theory that it was the duty of the company to provide a good track, and the act of the laborers was an act required of the master: *Vantraln v. St. Louis*, 8 Mo. App. R., 538.

Upon the same principle, an engine driver and track repairers: *Chicago*, etc., *v. Moranda*, 8 Amer. Law Record, 682, 94 Ills., 302.

These cases seem to be contrary in principle to *Holden v. Fitchburg*, etc., 129 Mass., 268, where it was held that the company was not liable to a brakeman for an injury received from a derrick being used by laborers in widening the track. The Massachusetts case seems to us to be based on principle, and the better authority.

The cases in *Indiana* hold the same as the *Massachusetts* case: *Gormley v. Ohio*, etc., 72 Ind., 31.

The master is required to employ skillful and competent fellow servants, and to use due care to that end.

*Canada, Upper*: *Wilson v. Hume*, 30 U. C. Com. Pl., 542.

*Indiana*: *Ohio*, etc., *v. Collarn*, 73 Ind., 261.

*Maine*: *Blake v. Maine Cent.*, 70 Maine, 60.

Charles v. Taylor.

1878

**Michigan:** Quincy, etc., v. Kitts, 42 Mich., 84; Marquette, etc., v. Taft, 28 id., 289.

**New York:** Chapman v. Erie Railway, 55 N. Y., 579; Henry v. Brady, 11 Weekly Dig., 861, 83 N. Y., 619.

**Wisconsin:** Fitts v. Waldeck, 51 Wisc., 567.

It is the duty of the master to his servant to discharge from his service, upon notice thereof, any other servant who, from any cause, as, for example, intoxication, has ceased to be competent and skilful.

**Indiana:** Ohio, etc., v. Collarn, 73 Ind., 261.

**United States, Circuit and District:** Ross v. Chicago, etc., 8 Fed. Repr., 544.

To recover for an injury caused by the incompetency of a fellow servant, it must be shown that such incompetency was known, or should have been known, to the master, if he had been in the exercise of ordinary diligence.

**Canada, Upper:** Wilson v. Hume, 30 U. C. Com Pl., 542.

**Illinois:** Kranz v. White, 8 Bradw., 583.

**Maine:** Blake v. Maine, etc., 70 Maine, 60.

**Missouri:** Marshall v. Schniker, 63 Mo., 308.

**Texas:** H., etc., v. Willis, 53 Tex., 318.

**United States, Circuit and District:** Jordan v. Wells, 3 Woods, 527.

The law presumes that railroad companies employ for their service persons of reasonable competency and fitness for their duty, and furnish proper machinery and appliances; and this presumption exists till the company is notified of their incompetency and unfitness.

**New York:** Painton v. Northern, etc., 83 N. Y., 7.

**United States, Circuit and District:** Graville v. Minneapolis, etc., 10 Fed. Repr., 711.

**Wisconsin:** Steffen v. Chicago, etc., 46 Wisc., 259.

Proper qualifications of an employe once possessed, are presumed to continue, and the master may rely on that presumption until notice of the change.

**Maine:** Blake v. Maine Central, 70 Maine, 60.

**New York:** Chapman v. Erie Railway, 55 N. Y., 579.

When the unfitness of a servant is shown to have existed at the time of employment, a *prima facie* case is made out against the master, and the burthen is upon him to disprove negligence.

**Minnesota:** Crandall v. McIlrath, 24 Minn., 127.

As to the extent of investigations which the master must make as to alleged acts of carelessness on the part of a servant, incompetency, etc., see

**Texas:** H., etc., v. Willis, 53 Tex., 318.

A notice of the defect to the car inspector and master mechanic would only tend to show negligence of duty on their part, and they being fellow servants, no cause of action could be based on such negligence.

Notice of the habitual negligence and general bad habits of a car inspector, brought home to the master mechanic of a railroad company, will not make the company liable for an injury to another servant of the company, resulting from the negligence of the car inspector, unless it is shown that power was conferred by the company upon the master mechanic to employ and discharge the car inspector: Kidwell v. H. & G. N. R. R. Co., 3 Woods, 318.

Evidence that an engineer had threatened to run over a brakeman is admissible in a suit by the brakeman against the company for such an act by the engineer, as a circumstance showing the want of care on the part of the company in the selection of him as its engineer, but it should be so restricted by appropriate instructions: Houston, etc., v. Willis, 53 Tex., 318.

If an employe of his own personal malice injure a co-servant, the master is not liable for such injury: Houston, etc., v. Willis, 53 Tex., 318.

For an elaborate collection of cases relative to the liability of a master to his servant for injuries from defective machinery, see 3 Legal Adviser, 100; 18 Amer. Law Reg. (N.S.), 766.

The duty of the master to the servant, and the implied contract between them, is to the effect that the master shall furnish proper, perfect, and adequate help, machinery, or other appliances necessary for the proposed work, or to use proper, reasonable care in providing such machinery and appliances, which in case of railways includes tracks.

1878

Charles v. Taylor.

**Arkansas:** Little Rock, etc., v. Dufey, 85 Ark., 602.

**Georgia:** Central Railroad v. Mitchell, 63 Geo., 178.

**Illinois:** Indianapolis, etc., v. Estes, 96 Ills., 470; Chicago, etc., v. Scheuring, 4 Bradw., 533; Chicago, etc., v. Mahony, Id., 262.

**Indiana:** Lake Shore, etc., v. McCormick, 74 Ind., 440.

**Iowa:** Braun v. C. R., etc., 53 Iowa, 595.

**Maryland:** Cumberland, etc., v. Moran, 44 Md., 283; Cumberland, etc., v. Hogan, 45 id., 229.

**Massachusetts:** Ford v. Fitchburg, 110 Mass., 240; Arkerson v. Dennison, 117 id., 407; Killea v. Faxon, 125 id., 486; Mulcahy v. Methodist, Id., 487; Holden v. Fitchburg, etc., 129 id., 268.

**Minnesota:** Drymala v. Thompson, 26 Minn., 40.

**Missouri:** Porter v. Hannibal, etc., 71 Mo., 66; Bridges v. St. Louis, etc., 6 Mo. App., 385; McMillan v. Union, etc., Id., 434; Vantrain v. St. Louis, etc., 8 id., 538.

**New York:** Painton v. Northern, etc., 83 N. Y., 7; Fort v. Whipple, 11 Hun, 586; Durkin v. Sharp, 14 N. Y. Weekly Dig., 97; Kirkpatrick v. N. Y. Central, 79 N. Y., 240; Cone v. Delaware, etc., 81 id., 206; Hawley v. Northern, etc., 82 id., 370, 17 Hun, 115; Manning v. Hogan, 9 Weekly Dig., 237, 78 N. Y., 615; Booth v. Boston, etc., 73 id., 88; Kain v. Smith, 25 Hun, 146; Heiner v. Heuvelman, 8 Weekly Dig., 17; Plank v. N. Y. Cent., 60 N. Y., 607, as corrected in De Forest v. Jewett, 25 Alb. L. J., 297.

See Marvin v. Muller, 25 Hun, 163.

**Ohio:** Berea, etc., v. Kraft, 31 Ohio St. R., 287.

**Pennsylvania:** Baker v. Alleghany, 20 Am. L. Reg. (N.S.), 724, 728 note.

**Texas:** Houston v. Texas, etc., 49 Tex., 181; International, etc., v. Doyle, Id., 190; Galveston, etc., v. Delahaunty, 53 id., 206.

**United States, Circuit and District:** Graville v. Minneapolis, etc., 10 Fed. Repr., 711; McMahon v. Henning, 1 McCrary, 516.

**Wisconsin:** Stetler v. Chicago, etc., 46 Wisc., 497; Thompson v. Hermann, 47 id., 602.

The rule that the employer is liable to a servant injured by defective ma-

chinery, does not apply to a servant injured while taking defective cars to the repair shop. That is one of the risks of the business which the servant subjects himself to by the employment: Flannagan v. Chicago, etc., 50 Wisc., 463, following S. C., 45 id., 99.

Employers engaged in constructing or repairing machines for others, are not liable to their employes engaged in the latter part of the work, for an injury resulting from the fact that another employe so negligently did the prior part of the work, as to leave the machine unfit to have the latter part of the work done upon it. The general rule that the master is bound to provide a machine which is safe for his servants, does not apply where the accident occurs not in the operation of a machine belonging to or used for the master, but in his construction or repair of a machine for others: Murphy v. B. & A. R. R. Co., 8 Abb. N. C., 41.

See also National, etc., v. Bedell, 28 Pittsb. Leg. Jour., 260.

In a suit against a railroad company for injury to an employe where no recovery can be had for negligence of a co-employe, if defendant's use of the track alleged to be insufficient was only occasional, and for special purposes and under special instructions to those in charge of trains as to the manner of running thereon, it is liable only in case it was negligence to use the track in that manner and for those purposes: Stetler v. Chicago, etc., 46 Wisc., 497.

It is the duty of a railroad company to exercise a continual supervision over machinery and appliances furnished its servants, to exercise ordinary diligence and care, under the circumstances, to keep them in proper repair.

**Illinois:** Chicago, etc., v. Platt, 89 Ills., 141, 1 Weekly Jur., 23; Chicago, etc., v. Mahoney, 4 Bradw., 262.

**Iowa:** Braun v. C. R., etc., 53 Iowa, 595.

**Minnesota:** Drymala v. Thompson, 26 Minn., 40.

**Missouri:** Porter v. Hannibal, etc., 71 Mo., 66; Bridges v. St. Louis, etc., 6 Mo. App., 389; McMillan v. Union, etc., Id., 434.

**New York:** Durkin v. Sharp, 14 N. Y. Weekly Dig., 97; Cone v. Delaware, etc., 81 N. Y., 206.

See Painton v. Northern, etc., 83



N. Y., 7; *De Graaf v. N. Y. Cent., etc.*, 76 id., 125; *Kirkpatrick v. N. Y. Central*, 79 id., 240.

**Pennsylvania:** *Baker v. Alleghany, etc.*, 20 Amer. Law Reg. (N.S.), 724, 728 note.

**United States, Circuit and District:** *Kidwell v. Houston, etc.*, 3 Woods, 313.

In actions against an employer for injuries to a servant, caused by defective machinery, due care on the part of the employe is essential to a right of recovery: *Missouri, etc., v. Abend*, 9 Bradw., 319; *Glover v. Gray, Id.*, 329.

Where an employe was injured when cleaning the ash-pan beneath his engine, which it was not necessary to do at that particular time and the place where the engine was stopped, was one of especial hazard, the court held, on all the circumstances, the employe was injured by his own negligence, and could not recover: *Union, etc., v. Leahy, 9 Bradw.*, 353.

If the employe be a boy, his knowledge of the danger is to be taken into account. He must exercise a degree of care and caution, which might reasonably be expected from a person of his years and understanding, in the same position, and surrounded by like circumstances: *Glover v. Gray, 9 Bradw.*, 329.

Where a deaf and dumb child, under ten years old, was on the cars of a company, by permission of its employes, where he was injured through negligence of the employes of the company, the company cannot escape liability on the mere ground that he was there without lawful permission of the company: *Lammert v. Chicago, etc.*, 9 Bradw., 388.

See also *Day v. Brooklyn, etc.*, 12 Hun, 435, 76 N. Y., 593.

The plaintiff, an employe of the defendant, was injured while riding on a hand-car, owing to its defective condition. One Brown as "section boss" had charge of about five miles of track, and was foreman of the men employed to keep it in repair, hiring and working with them. He was responsible for tools and machinery, and if any were wanted or out of repair he applied or reported to the trackmaster, who furnished the necessary machinery and directed as to the repairs. If machinery was defective Brown was or-

dered to have it repaired. The trackmaster employed the foremen of the sections, and they were subject to him. Brown knew of the defect in the hand-car, but had not notified the trackmaster thereof. Held, that Brown did not represent the company so as to render it liable for his negligence resulting in an injury to a fellow servant: *Barringer v. Delaware, etc.*, 19 Hun, 216; S. C., second appeal, 13 N. Y. Weekly Dig., 356.

Where the foreman in charge of a pile driver had full authority to have it repaired when out of repair, and to hire and discharge the crew working it, knew that the machine was in a dangerous condition in time to have it repaired before the injury, but omitted to have it repaired, and one of the crew was injured from such want of repair; held, that the foreman's negligence was the negligence of the employer, and rendered it liable for the injury: *Schultz v. Chicago, etc.*, 48 Wisc., 375, 380; *Babbitt v. Railway*, 38 id., 289; *Porter v. Hannibal, etc.*, 71 Mo., 66.

Whether or not a railroad company was guilty of negligence in failing to inspect and repair a car of another company passing over its road, such as would render it liable to an employe for injuries received by reason of such car becoming out of repair while on its passage over the road, in a particular which would have been disclosed by an inspection conducted with ordinary care, was held to be a question for the jury: *Braun v. C. R. I. & P. R. R. Co.*, 53 Iowa, 595; *O'Neill v. St. Louis, etc.*, 9 Fed. Repr., 337.

That a master might have known by the use of ordinary care and diligence that a tool furnished his servant for use was defective, it is not sufficient to make him liable for the injury resulting from its use, irrespective of any probability of harm or danger in using it.

**Arkansas:** *Little Rock, etc., v. Duffey*, 35 Ark., 602.

**Illinois:** *Chicago, etc., v. Abend*, 7 Bradw., 130.

**New York:** *Painton v. Northern, etc.*, 83 N. Y., 7.

See *DeGraaf v. N. Y. Cent.*, 76 N. Y., 125.

**Texas:** *International, etc., v. Doyle*, 49 Tex., 190.

1878

Charles v. Taylor.

Where dangerous machinery is so placed that the danger is hidden or not apparent, so that to an inexperienced person the machinery may appear safe, and an inexperienced employe, who had no warning of the danger, is injured by such machinery while in the regular course of his business, he is not necessarily precluded from recovering against his employer on the ground of contributory negligence.

**Massachusetts:** O'Connor v. Adams, 120 Mass., 427.

**Michigan:** Swoboda v. Ward, 40 Mich., 420.

**Missouri:** Dowling v. Allen, 6 Mo. App., 195.

See Cagney v. Hannibal, etc., 69 Mo., 416.

An employer who introduces, without notice to his employe, new and unusual machinery, whether belonging to himself or another, involving an unexpected and unanticipated danger, through the introduction of which the employe, while using the care and diligence incident to his employment, meets with an accident, is liable in damages.

**Massachusetts:** Walsh v. Peet Valve Co., 110 Mass., 23.

**Michigan:** Swoboda v. Ward, 40 Mich., 420.

**United States, Circuit and District:** O'Neill v. St. Louis, etc., 9 Fed. Repr., 337.

The master is not a guarantor of the safety of machinery and appliances furnished by him. There must be notice of defects to the master or his agents, or they must be such as can be discovered by inspection, or there must be a want of reasonable care, the exercise of which would have discovered the defect.

**Illinois:** Chicago, etc., v. Platt, 89 Ills., 141; East, etc., v. Hightown, 92 id., 139; Pennsylvania, etc., v. Lynch, 90 id., 333; Chicago, etc., v. Scheuring, 4 Bradw., 533; Chicago, etc., v. Monka, Id., 664; Price v. Henagan, 5 id., 234; Heyer v. Salisbury, 7 id., 93; Chicago, etc., v. Mahony, 4 id., 262; Kranz v. White, 8 id., 583.

**Indiana:** Lake Shore v. McCormick, 74 Ind., 440.

**Iowa:** Conway v. Illinois Central, 50 Iowa, 465.

**Minnesota:** Drymala v. Thompson, 26 Minn., 40.

**Missouri:** Porter v. Hannibal, etc., 71 Mo., 66.

**New York:** Painton v. Northern, etc., 83 N. Y., 7; Slater v. Jewett, 85 id., 61; De Graaf v. N. Y. Cent., 76 id., 25; Jones v. N. Y. Cent., 22 Hun, 284; Kain v. Smith, 25 id., 146.

See Durkin v. Sharp, 14 Weekly Dig., 97.

**Pennsylvania:** Baker v. Alleghany, etc., 20 Am. L. Reg. (N.S.), 724, 728 note.

**Texas:** Galveston, etc., v. Dela-haunty, 53 Tex., 206.

**United States, Supreme Court:** Hough v. Railway Co., 100 U. S. R., 100.

**United States, Circuit and District:** Kidwell v. Houston, etc., 3 Woods, 313.

Railroad companies are bound to use appliances which are not defective in construction, but as between them and their employes they are not bound to use such as are of the very best or most improved description. If they use such as are in general use, that is all that can be required.

**Illinois:** Chicago, etc., v. Mahony, 4 Bradw., 262.

**Indiana:** Lake Shore v. McCormick, 74 Ind., 440.

**Iowa:** Baldwin v. Chicago, 50 Iowa, 680, 18 Am. L. Reg. (N.S.), 761, 766 note.

**Missouri:** Smith v. St. Louis, 69 Mo., 32, 14 Am. L. Rev., 289, 295 note, 9 Cent. L. J., 51; Cagney v. Hannibal, etc., 69 Mo., 416.

**Rhode Island:** Kelly v. Silver, etc., 12 R. I., 112.

It does not constitute negligence for a railroad company, in the ordinary course of business, to receive and transport the cars of other roads in general use, which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which an employe assumes in undertaking the employment: Baldwin v. Chicago, etc., 50 Iowa, 680, 18 Am. Law Reg. (N.S.), 761, 766 note.

There is no presumption that a railroad, or its superintendent of car shops, has any better means of information as to current improvements in machinery than are accessible to an experienced mechanic in the shops: Cagney v. Hannibal, etc., 69 Mo., 416.

Where an employer has furnished his employes with tools and appliances which, though not the best possible to be obtained, may, by ordinary care be used without danger, he has discharged his duty, and is not responsible for accidents.

**Indiana:** Lake Shore, etc., v. McCormick, 74 Ind., 440.

**Missouri:** Cagney v. Hannibal, etc., 69 Mo., 416.

**New York:** Painton v. Northern, etc., 83 N. Y., 7.

**Pennsylvania:** Pittsburg, etc., v. Sentmyer, 92 Penn. St. R., 276.

**Texas:** International, etc., v. Doyle, 49 Tex., 190.

If the instrumentalities furnished by the master for the performance of the servant's duties are defective, and the servant is aware of this, though not aware of the degree of defectiveness, he is bound to use his eyes to see that which is open and apparent to any person using his eyes, and if he fails to do so, he cannot charge the consequences upon his master.

**Illinois:** Penn., etc., v. Lynch, 90 Ills., 333; Chicago, etc., v. Bliss, 6 Bradw., 411; Morris v. Gleason, 4 id., 395; Lake, etc., v. Roy, 5 id., 82; Price v. Henagan, Id., 234.

**Iowa:** Perigo, etc., v. C., 52 Iowa, 276.

**Michigan:** But see Swoboda v. Ward, 40 Mich., 420.

**Minnesota:** Walsh v. St. Paul, etc., 27 Minn., 367.

**Missouri:** Smith v. St. Louis, etc., 69 Mo., 32, 14 Am. L. Rev., 289, 295 note; Conroy v. Vulcan, etc., 6 Mo. App., 102.

See Porter v. Hannibal, etc., 71 Mo., 66; Bridges v. St. Louis, etc., 6 Mo. App., 389; McMillan v. Union, etc., Id., 434.

**New York:** De Forest v. Jewett, 25 Alb. L. J., 297, affirming 23 Hun, 490; Plank v. N. Y. Cent., 60 N. Y., 607, as explained in De Forest v. Jewett, 25 Alb. L. J., 297.

See McMahon v. Port Henry, etc., 24 Hun, 48; Hawley v. Northern, etc., 82 N. Y., 370, 17 Hun, 115.

**Pennsylvania:** Green, etc., v. Bresmer, 97 Penn. St. R., 103; Phila., etc., v. Schertle, Id., 450.

**Rhode Island:** Kelly v. Silver, etc., 12 R. I., 112.

**Texas:** International, etc., v. Doyle, 49 Tex., 190.

**Victoria:** Litton v. Thornton, 7 Vict. L. R. (Law), 4.

**Wisconsin:** The case of a sailor, obliged to obey the orders of a captain, seems to be an exception to the rule: Thompson v. Hermann, 47 Wisc., 602.

If a servant be injured in the working of a machine by reason of a defect in its construction which he might reasonably have discovered, and which he did not report to his master, he cannot recover damages against the master: Litton v. Thornton, 7 Vict. L. R. (Law), 4; Green, etc., v. Bresmer, 97 Penn. St. R., 103, 38 Leg. Int., 440.

If a servant accept or continue in service with knowledge of the character and position of structures from which employes might be liable to receive injuries, he cannot call upon his master to make alterations to secure greater safety, or in case of injury to hold him responsible.

**Illinois:** Penn., etc., v. Lynch, 90 Ills., 333; Chicago, etc., v. Bliss, 6 Bradw., 411; Morris v. Gleason, 4 id., 395; Lake, etc., v. Roy, 5 id., 82; Price v. Henagan, Id., 234.

But see Chicago, etc., v. Russell, 91 Ills., 298, 6 West. Jur., 193.

**Massachusetts:** Lovejoy v. Boston, etc., 125 Mass., 79.

**Missouri:** Smith v. St. Louis, etc., 69 Mo., 32, 14 Am. Law Rev., 289, 295 note; Conroy v. Vulcan, etc., 6 Mo. App., 102.

See Bridges v. St. Louis, etc., 6 Mo. App., 385; McMillan v. Union, etc., Id., 434.

**New York:** Ryan v. Wilson, 1 N. Y. Cond. Rep., 188, 13 Weekly Dig., 513; De Forest v. Jewett, 25 Alb. L. J., 297, affirming 23 Hun, 490; Leonard v. Collins, 70 N. Y., 90; Gibson v. Erie, 63 id., 449, reversing 5 Hun, 31; Plank v. N. Y. Cent., 60 N. Y., 607, as corrected in De Forest v. Jewett, 25 Alb. L. J., 297.

**Pennsylvania:** Green, etc., v. Bresmer, 97 Penn. St. R., 103; Phila., etc., v. Schertle, Id., 450.

**Rhode Island:** Kelly v. Silver, etc., 12 R. I., 112.

If the servant of a railway company who has knowledge of defects in machinery gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use

1878

Charles v. Taylor.

of it in the well-grounded belief that it will be put in proper condition within a reasonable time, does not necessarily, or as matter of law, make him guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care.

**Missouri:** Conroy v. Vulcan, etc., 6 Mo. App., 102.

**New York:** Hawley v. Northern, etc., 82 N. Y., 320, 17 Hun, 115; Marsh v. Chickering, 25 Hun, 405.

**Scotland:** Baird v. McMonagh, 19 Scot. L. Repr., 256.

**United States, Supreme Court:** Hough v. Railway Co., 100 U. S. R., 213.

A railroad company is liable for the negligent act of a foreman having charge of dangerous machinery, who in the course and within the scope of his duties orders an infant or inexperienced employe under him upon a service hazardous to life or limb, and which was not within the scope of the ordinary or proper duties of the servant thus commanded to perform it; in such a case the rule which exempts the employe from liability to one servant for the negligence of a fellow servant, in the same common service, has no just application.

**Massachusetts:** O'Connor v. Adams, 120 Mass., 427; Combs v. New Bedford, etc., 102 id., 572.

But see Curran v. Merchants, etc., 130 Mass., 374.

**Missouri:** Dowling v. Girard, etc., 14 Cent. L. J., 92.

**New York:** See Costello v. Judson, 21 Hun, 396; De Graaf v. N. Y. Cent., etc., 76 N. Y., 125.

**United States, Circuit and District:** Fort v. Union Pacific, etc., 2 Dillon, 259.

As between an employer and a person operating machinery or a fellow servant, the fact that the machine exploded is not *prima facie* evidence of negligence: Kranz v. White, 8 Bradw., 583.

Where a building was burned from want of water in a cistern in an upper story of a building, held, in the absence of proof of any reason why the water did not run, that it must be attributed to the negligence of the fellow servants of the plaintiff in failing to

keep the pipes and apparatus in order, or in failing to put it in operation: Jones v. Granite, etc., 126 Mass., 84.

See also Keith v. Granite Mills, 126 Mass., 90.

*For cases in which the master was held not liable to a servant:*

For the breaking of an eye-bolt: Painton v. Northern, etc., 83 N. Y., 7.

From kick of a horse he was cleaning: Green, etc., v. Bresmer, 97 Penn. St. R., 103.

While coupling cars: Toledo, etc., v. Black, 88 Ills., 112; Gibson v. Northern, etc., 22 Hun, 289; Lake Shore v. McCormick, 74 Ind., 440; Phila., etc., v. Schertle, 97 Penn., 450; De Forest v. Jewett, 14 N. Y. Weekly Digest, 80, affirming 23 Hun, 490.

For starting of machinery by superintendent: Crispin v. Babbitt, 81 N. Y., 516, 37 Am. R., 521.

Collision of trains out of time: Slater v. Jewett, 85 N. Y., 61.

For injury to the foot of a boy of 14, running an elevator: Costello v. Judson, 21 Hun, 396.

For being struck by a post by the side of a railway track: Lovejoy v. Boston, etc., 125 Mass., 79.

One injured by an explosion of a steam boiler while a co-employe was repairing a defect in it: Morse v. Glendon, etc., 125 Mass., 282.

For the fall of a staging being erected by co-servants: Killea v. Faxon, 125 Mass., 485.

The wooden roller of a hand-car having broken, servant put on glove to save hand; glove caught and injured servant: International, etc., v. Doyle, 49 Tex., 190.

The breaking of a brake-chain: De Graaf v. N. Y. Cent., 76 N. Y., 125.

For an injury to a servant while making a running switch: Lake Shore, etc., v. Knittel, 83 Ohio St. R., 463.

For a defective ladder upon a car: Chicago, etc., v. Platt, 89 Ills., 141, 1 Weekly Jur., 23.

For not providing a fire-escape: Jones v. Granite Mills, 126 Mass., 84; Keith v. Granite Mills, Id., 90.

For not having water in cistern on upper stories of building: Jones v. Granite Mills, 126 Mass., 84; Keith v. Granite Mills, Id., 90.

A common door used for unloading freight broke: Pennsylvania, etc., v. Lynch, 90 Ills., 333.

From a bank falling by excavation : *O'Sullivan v. Victoria*, etc., 44 U. C. Q. B., 128; *Leonard v. Collins*, 70 N. Y., 90.

But see *Lake*, etc., *v. Erickson*, 39 Mich., 492; 18 Am. Law Reg. (N.S.), 28, 35 note.

For roadmaster turning a switch, throwing engine off track : *Walker v. Miller*, 128 Mass., 8.

The falling of an elevator : *Kelly v. Boston*, etc., 128 Mass., 456.

One injured by machinery not boxed : *Kelly v. Silver*, etc., 12 R. I., 112.

Conductor of a freight train hit by the roof of a depot building : *Gibson v. Erie*, etc., 63 N. Y., 449.

For the caving in of the sides of a sewer, from not using braced planks to keep the soil from caving in : *Zeigler v. Day*, 123 Mass., 152.

One under cars, repairing them, injured by backing other cars against one he was under : *Besel v. N. Y. Cent.*, 71 N. Y., 171.

Where laborers made a cavity into which one coupling cars fell : *Vantrain v. St. Louis*, etc., 8 Mo. App., 538.

Laborer injured on a train while going to work : *Howland v. Milwaukee*, etc., 11 N. W. Repr., 529, Supreme Court, Wisc.; *Kumler v. Junction*, etc., 33 Ohio St. R., 150.

For injury sustained by a brakeman from a derrick used by laborers widening the track : *Holden v. Fitchburg*, 128 Mass., 268.

One servant, a boy between 14 and 15, injured while cleaning machinery, from its being started by another servant, the servant injured having done such work for two and a half years : *Curran v. Merchants*, etc., 130 Mass., 374.

But see *O'Connor v. Adams*, 120 Mass., 427.

A track repairer injured while on a hand-car by collision with a train : *Gormley v. Ohio*, etc., 72 Ind., 31.

A laborer injured by a defective hand-car : *Barringer v. D. & H.*, 19 Hun, 216, 13 N. Y. Weekly Dig., 356.

A laborer injured by the fall of a derrick : *Marvin v. Muller*, 25 Hun, 163.

*For cases where the master was held liable :*

For the breaking of an eye-bolt : *Painton v. Northern*, etc., 83 N. Y., 7.

But see *De Graaf v. N. Y. Cent.*, 76 N. Y., 125.

For the fall of a staging erected by the master, upon which a servant was sent : *Mulchey v. Methodist*, etc., 125 Mass., 487; *Fort v. Whipple*, 11 Hun, 586; *Manning v. Hogan*, 9 Weekly Dig., 237, 78 N. Y., 615.

For injuries from servant's trowsers catching upon an unknown cog-wheel : *Swoboda v. Ward*, 40 Mich., 420.

For defective track from which engine ran off : *Durkin v. Sharp*, 14 N. Y. Weekly Dig., 97.

For injury from coal thrown by an engineer of a locomotive : *Chicago*, etc., *v. Moranda*, 98 Ills., 302.

Where railway track taken up by section boss without proper signals : *Drymala v. Thompson*, 26 Minn., 40.

For a defect in a track not specially known to the employee, although he knew it was generally out of repair : *Porter v. Hannibal*, etc., 71 Mo., 66.

One injured by machinery not fixed : *Swoboda v. Ward*, 40 Mich., 112; *Dowling v. Allen*, 6 Mo. App., 195.

Falling from a ladder insecurely fastened by a boy incompetent to do such work : *Henry v. Brady*, 11 N. Y. Weekly Dig., 361, 83 N. Y., 619.

For injury to a brakeman from being struck by a telegraph pole too near the track : *Chicago*, etc., *v. Russell*, 91 Ills., 298, 6 West. Jur., 193.

To a servant injured by dangerous revolving machinery, as to the danger and use of which he was not instructed : *O'Connor v. Adams*, 120 Mass., 427.

But see *Curran v. Merchants*, etc., 130 Mass., 374.

For not sending sufficient brakemen on a train : *Booth v. Boston*, etc., 73 N. Y., 38, 29 Amer. R., 97.

For one injured by the explosion of an unsafe engine : 44 Ills., 283; *Cumberland*, etc., *v. Hogan*, 45 Md., 229.

To one injured by fall of ladder : *Marsh v. Chickering*, 25 Hun, 405.

One servant is liable to a fellow servant for an injury occasioned by the negligence of the first in such employment : *Osborn v. Morgan*, 130 Mass., 102, 20 Amer. Law Reg. (N.S.), 399; *Moak's Underhill on Torts*, 55, 23 Alb. L. J., 408; *Hinds v. Harbon*, 58 Ind., 121, 18 Alb. L. J., 423.

1878

Johnson v. Lancashire and Yorkshire Railway Co.

[3 Common Pleas Division, 499.]

March 2; July 8, 1878.

JOHNSON and Others v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY AND THE WIGAN WAGON COMPANY, Limited.

*Conversion—Vendor and Purchaser—Delivery of Goods to Order of Third Party assenting to pay—Resumption of Possession by Vendor—Conversion—Measure of Damages.*

The plaintiffs, being under contract to sell wagons, employed L. to make them according to sample at a certain price. L. then employed the defendant wagon company to make them according to sample at a lower price. The company afterwards proposed to receive payment direct from the plaintiffs, who consented and were authorized by L. to pay them. Some wagons were delivered by the wagon company to the defendant railway company to the order of the plaintiffs. The plaintiffs sent a complaint to the wagon company that the wagons were unequal to sample, but did not reject them; and they informed L., and also the wagon company, that they would dispose of the wagons at the best price obtainable, and hold L. responsible for loss. L. rejected the wagons. The plaintiffs gave notice to the railway company not to deliver the wagons without their order, but the railway company nevertheless delivered them to the wagon company, who refused to give them up. In an action against both companies for conversion:

*Held* (1.) That, the property in the goods and the right to possession of them having passed to the plaintiffs, both defendants were liable:

(2.) That the arrangement for the advantage of the wagon company, that they should receive direct payment from the plaintiffs, had not created any relationship between them which would prevent the application of the ordinary rule as to the measure of damages in trover against mere strangers; and that the plaintiffs were, therefore, entitled to recover the full value of the goods at the time of the conversion, without deduction of the price.

FURTHER CONSIDERATION. Statement of claim. 1. Between the months of July and October, 1876, the plaintiffs deposited with the defendants at the Ratcliffe Bridge railway station thirty-eight tip-wagons, the property of the plaintiffs, and the defendants received the wagons to hold them to the order of the plaintiffs.

500] \*2. In October, 1876, the plaintiffs demanded of the defendants delivery of the wagons, but the defendants detained the same and refused to deliver the same to the plaintiffs or to their order. Claim, £817 damages.

By the particulars the plaintiffs claimed £21 10s. per wagon as the value.

Judgment having been signed for want of a statement of defence, a judge at chambers, on the 28th of July, 1877, made an order that the judgment and all subsequent proceedings should be set aside, the statement of claim should be delivered to the Wigan Wagon Company, and they should be at liberty to appear and defend the action.

A statement of defence was on the 4th of August delivered on behalf of the Lancashire and Yorkshire Railway Company, denying that they received the wagons to hold to the order of the plaintiffs, and alleging that the wagons were despatched to the station for delivery to the plaintiffs' order by the Wigan Wagon Company, but that the plaintiffs and one Waller, to whom by the plaintiffs' order the defendants tendered the wagons, refused to accept them, and they were returned to the defendants and lay an unreasonable time at their station obstructing the railway, and were also claimed by the Wigan Wagon Company, to whom the defendants redelivered them, and who were prepared to dispute the plaintiffs' claim.

The Wigan Wagon Company, by their statement of defence, in addition to a denial of the allegations in the statement of claim, alleged that, in May, 1876, they entered into an agreement with Lockwood & Co. to supply them with 100 tip-wagons according to an agreed sample, payment to be made on the 20th of the March following the completion of the agreement; that, before the completion of the agreement, it was agreed between Lockwood & Co., the Wigan Wagon Company, and the plaintiffs, that the plaintiffs should be substituted for Lockwood & Co. in the agreement; that delivery of the wagons should be made by the Wigan Wagon Company to the plaintiffs, and that payment as per agreement, with £1 per wagon additional (to be handed over to Lockwood & Co.), should be made by the plaintiffs to the Wigan Wagon Company; that the Wigan Wagon Company \*completed the agreement, and [501] were ready and willing to deliver the 100 wagons, and in fact delivered the thirty-eight mentioned in the statement of claim to the Lancashire and Yorkshire Railway Company for delivery to the plaintiffs; that the Lancashire and Yorkshire Railway Company tendered the thirty-eight wagons to the plaintiffs or order, but the plaintiffs and their agents refused to accept the wagons from the railway company, upon the ground that they were not equal to sample, and returned the thirty-eight wagons to the defendants the Wigan Wagon Company through the railway company; and, by way of counter-claim, they claimed damages against the plaintiffs for non-acceptance of the 100 wagons.

The plaintiffs in their reply joined issue as against the Lancashire and Yorkshire Railway Company; and, as against the Wigan Wagon Company, they denied that it ever was agreed that the plaintiffs should be substituted for Lockwood & Co. in the agreement of May, 1876, and alleged

1878

Johnson v. Lancashire and Yorkshire Railway Co.

that an agreement was made by the plaintiffs and Lockwood & Co., whereby Lockwood & Co. agreed to sell and the plaintiffs to buy wagons according to a certain sample wagon; that it was afterwards understood by the plaintiffs that the wagons were to be made for and sold to Lockwood & Co. by the defendants; that it was subsequently arranged between the Wigan Wagon Company and the plaintiffs that, after delivery, the plaintiffs would, on account of Lockwood & Co., and on receiving their authority, pay the defendants the price Lockwood & Co. had agreed to pay them for the wagons; but that this arrangement was purely for the convenience of Lockwood & Co. and the Wigan Wagon Company; and the plaintiffs never made themselves responsible to the Wigan Wagon Company for the price, but that it was expressly agreed that the relation between the parties should not be altered; that Lockwood & Co., by the Wigan Wagon Company, did deliver to the plaintiffs the thirty-eight wagons, and the same were received by the Lancashire and Yorkshire Railway Company, to hold to their order until the breach in the statement of claim alleged; that the wagons were not according to contract, and the plaintiffs, who had resold the wagons, had a claim against Lockwood & Co.'s estate for their breach of contract in respect of these 502] \*wagons and other wagons not the subject of this action. Issue thereon.

The cause was tried before Denman J., at the Yorkshire Assizes. The facts proved at the trial, and the arguments urged on a motion for judgment, are fully set forth in the judgment.

Feb. 16. *C. Russell*, Q.C., appeared for the plaintiffs; *Edwards*, Q.C., for the Wigan Wagon Company; and *Crompton*, for the Lancashire and Yorkshire Railway Company.

*Cur. adv. vult.*

March 2. DENMAN, J., after stating the nature of the action, said: At the trial it appeared that, on the 11th of May, 1876, the plaintiffs had employed the Messrs. Lockwood to manufacture for them 100 tip-wagons at £18 each, according to a sample wagon agreed upon. The plaintiffs had themselves contracted with one Waller to supply him with a similar number of similar wagons at £21 10s. each, which for thirty-eight wagons would make a profit of £133. On the 10th of May Lockwoods employed the Wigan Wagon Company to manufacture the 100 wagons required by the plaintiffs at £17 per wagon; and the Wigan Wagon



Company on the 24th proposed to charge the plaintiffs for the wagons direct, to which proposal the plaintiffs on the 25th assented upon receiving Lockwoods' authority so to pay. In June, the plaintiffs, being pressed by Waller for the wagons, pressed both Lockwoods and the wagon company for expedition in delivery; and on the 26th of June some wagons were delivered to one of the stations of the Lancashire and Yorkshire Railway Company, to the order of the plaintiffs, but not to the station named in the contract between the plaintiffs and Lockwoods. The plaintiffs on the 26th of June wrote to the wagon company stating that their customers complained that the first lot were not according to sample. The thirty-eight wagons, the subject of the action, were on the 22d of July lying to the order of the plaintiffs at the Ratcliffe station of the Lancashire and Yorkshire Railway. On that date the plaintiffs wrote to the wagon company as follows: "As you are interested in the 100 wagons supplied by you to Mr. Lockwood, and by him to us, we inclose copy of a letter written by us to-day to him, which will \*show you the position we are [503 advised to take up." Then followed a copy of the plaintiff's letter to Messrs. Lockwood intimating that, as the wagons were not according to sample, and *were rejected by their buyers, they would dispose of the wagons at the best price obtainable*, and hold Lockwoods responsible. Lockwoods also on the 24th wrote to the wagon company informing them that, as the wagons were not according to sample, they must decline to have anything further to do with them, and hold them responsible for any loss.

The jury found that Lockwoods had rejected the wagons; and it was contended that, this being so, the plaintiffs could not recover, as they could have no property in the goods which had been rejected by their vendors, who had not been paid. But, in answer to this, it was proved as against the Lancashire and Yorkshire Railway Company that they throughout held the goods to the order of the plaintiffs, and that, after notice from the plaintiffs not to deliver to any one without their order, they (the Lancashire and Yorkshire Railway Company) delivered the goods to the wagon company.

So far as the Lancashire and Yorkshire Railway Company are concerned, it therefore is clear that there is no defence to the action. As regards the wagon company, I think they are also liable; for, although I am of opinion that Lockwoods were still the parties liable, upon their contract with the plaintiffs, notwithstanding the arrangement that the

1878

Johnson v. Lancashire and Yorkshire Railway Co.

payments were to be made to the wagon company direct, I think that the wagon company had no control over the goods after they were once delivered to the railway company to the order of the plaintiffs. As against the wagon company, the property in the goods had passed to the plaintiffs, and they could not, I think, take advantage of a repudiation by Lockwoods, the plaintiffs being then in possession of the goods through the railway company, and claiming the property in the goods. The mere fact that they were at the same time insisting on their rights as against Lockwoods by reason of the goods not being according to sample would not alter or impair their property in the goods. I think therefore that the plaintiffs are entitled to recover as against both defendants.

As to damages,—I think the action is substantially an action of trover, and that the plaintiffs are not entitled to the full value of the goods, inasmuch as but for the concession they would have been bound to pay £18 per wagon to Lockwoods within a short period of the time when the conversion took place: but, unless they had been deprived of the wagons, I see no reason to think that they might not have made the profit of £3 10s. on each wagon which they would have made if no difficulties had occurred. This would for the thirty-eight wagons give a profit of £133, which I am inclined to think is the amount for which the judgment ought to be given: but, inasmuch as the question of damages was hardly discussed, I think it better to reserve final judgment (unless both parties agree to a judgment for £133) until both parties have had an opportunity of considering whether they desire a further discussion of the point. If neither party elects to apply for such further consideration of the matter within a week, the judgment to stand for that amount.

The plaintiffs not being satisfied with the amount of damages awarded, the case was again argued.

June 22. *C. Russell, Q.C., and R. Henn Collins*, for the plaintiffs: The measure of damages in trover generally is the value of the goods at the time of the conversion: see *Mulliner v. Florence* ('). Where a contract or relationship exists between the plaintiff and the defendant the measure of damages is, no doubt, sometimes different, as, for example, where the buyer of goods who has not paid the price sues the vendor, who has a lien, for converting them, in which case the measure of damages is the value of the goods

(') 3 Q. B. D., 484, at p. 490; 28 Eng. R., 390, 395.

less the unpaid price. But the distinction between cases where such relationship exists and those of conversion by a mere stranger or wrongdoer is recognized throughout the authorities which may be cited for the defendant: see *Chinery v. Viall* <sup>(1)</sup>; *Turner v. Hardcastle* <sup>(2)</sup>. *Johnson v. Stear* <sup>(3)</sup>, and the principle on which it is based, is well expressed in *Donald v. Suckling* <sup>(4)</sup>, by Shee, J., viz., "that between the parties to a contract the \*measure of [505] damages for a breach of the contract must be the same, whether the form of action be *ex contractu* or *ex delicto*, and that in such a case general rules applicable to the latter form, the only one competent for the redress of injuries purely tortious, are not to be strained to the doing of manifest injustice." The plaintiffs here had a right to immediate possession of the goods, and would be liable to Lockwood, their vendor, for the full value, and are entitled to recover it from the defendants, who are mere strangers and wrongdoers: *Edmundson v. Nuttall* <sup>(5)</sup>.

C. Crompton appeared for the Railway Company, defendants.

J. Edwards, Q.C., and Myburgh, for the Wagon Company, defendants: The Wagon Company are not mere strangers and wrongdoers. They had agreed with the plaintiffs to receive direct payment from them for the wagons supplied. The price charged and the value of the goods at the time of the conversion are identical, and as, if the plaintiffs kept the wagons, they must have paid the price, the damages actually sustained are nil, or nominal only, *Johnson v. Stear* <sup>(6)</sup>; *Donald v. Suckling* <sup>(7)</sup>; *Halliday v. Holgate* <sup>(8)</sup>; *Brierly v. Kendall* <sup>(9)</sup>, and see that case mentioned by Pollock, C.B., in *Toms v. Wilson* <sup>(10)</sup>; *Chinery v. Viall* <sup>(11)</sup>; Mayne on Damages (3d ed.), 352. The plaintiffs are not liable to their original vendors who have made default. No judgment for nominal damages in this action will affect the plaintiffs' right to sue Lockwoods, or to set up a counterclaim if sued.

R. Henn Collins replied: The defendants seem to raise the question of novation which they abandoned at the trial.

<sup>(1)</sup> 5 H. & N., 288, per Bramwell, B., at p. 295; 29 L. J. (Ex.), 180, at p. 184.  
<sup>(2)</sup> 11 C. B. (N.S.), 683, at p. 708; 31 L. J. (C.P.), 193, at p. 198.  
<sup>(3)</sup> 15 C. B. (N.S.), 330, at p. 337; 33 L. J. (C.P.), 130, at p. 133.  
<sup>(4)</sup> Law Rep., 1 Q. B., 585, at p. 601.  
<sup>(5)</sup> 17 C. B. (N.S.), 280; 34 L. J. (C.P.), 102.  
<sup>(6)</sup> 15 C. B. (N.S.), 330; 33 L. J. (C.P.), 130.  
<sup>(7)</sup> Law Rep., 1 Q. B., 585.  
<sup>(8)</sup> Law Rep., 3 Ex., 299.  
<sup>(9)</sup> 17 Q. B., 937; 21 L. J. (Q.B.), 161.  
<sup>(10)</sup> 4 B. & S., 442, at p. 458; 32 L. J. (Q.B.), 382.  
<sup>(11)</sup> 5 H. & N., 288; 29 L. J. (Ex.), 180.

1878

Johnson v. Lancashire and Yorkshire Railway Co.

[DENMAN, J.: The correspondence shows that the parties did not rely on any novation.]

And there was none in fact. The plaintiffs were under no binding contract to pay the company, and payment to them would not have discharged the liability of the plaintiffs towards Lockwoods.

*Cur. adv. vult.*

506] \*July 3. DENMAN, J., delivered final judgment. After recapitulating the facts, his Lordship said: The jury found that the value of the wagons at the time of the detention was £17 each, i.e., £646.

The plaintiffs contended that they were entitled to recover the full value of the wagons; the defendants, that nominal damages only could be recovered. I suggested on the former occasion that the plaintiffs were entitled to the £133 above mentioned. The parties, however, at my suggestion, desiring a further discussion upon it, the question of damages was elaborately argued in support of the two extreme contentions above mentioned, and many cases were quoted on both sides.

I am now of opinion that the measure of damages suggested by me was wrong, and that the plaintiffs are entitled to recover the value of the wagons at the time of the conversion, i.e., £646. It is laid down in all the text-books and authorities that, where goods are unlawfully converted, the proper measure of damages is *prima facie* the full value of the goods. Thus, in *Keen v. Priest* (\*), where the landlord, having a right to distrain upon other goods, seized sheep which were privileged on the ground that there were other goods on the premises, it was held that the full value of the sheep were recoverable, though the rent was due and other goods might have been taken. So, in *Gillard v. Brittan* (\*), where the seller of goods not paid for according to contract retook them from the buyer, even under circumstances inducing suspicion of fraud, it was held that the buyer was entitled to recover the full value of the goods. So, where a mortgagee of chattels, being an unpaid vendor, resumed possession in a manner not authorized by the deed, it was held that the vendee's and mortgagor's assigns were entitled to recover the full value of the goods: *Turner v. Hardcastle* (\*). So, in *Edmundson v. Nuttall* (\*), the plaintiff was held entitled to recover the full value of looms seized in

(\*) 4 H. & N., 236; 28 L. J. (Ex.), 157. (\*) 11 C. B. (N.S.), 683; 31 L. J. (C.P.),

(\*) 8 M. & W., 373; 11 L. J. (Ex.), 138. 193.

(\*) 17 C. B. (N.S.), 250; 34 L. J. (C.P.), 102.

execution, when if they had been seized one day later they would have been lawfully seized in execution for a debt due from the plaintiff to the defendant. In that case Byles, J., lays it down <sup>(1)</sup>, that \**“he who wrongfully converts [507 goods of another is prima facie liable in damages to the full value of the goods converted; and it is no answer to say that the wrongful act of the defendant has operated to relieve the plaintiff from a debt.” Swire v. Leach* <sup>(2)</sup> is to the same effect.

It is, however, laid down in several cases that there is no absolute law to the effect that in all cases the value of the goods ought to be recovered, but that the true measure of damage is the real damage sustained by the unlawful act of the defendant; and the defendants' counsel cited several cases in support of this proposition. The earliest of these was *Brierly v. Kendall* <sup>(3)</sup>, decided in 1852. It differed only from *Turner v. Hardcastle* <sup>(4)</sup>, mentioned above, in being an action against the mortgagee, instead of against a third party. But it was held that, where the mortgagees had entered prematurely before the day appointed for payment, though trespass would lie, the measure of damages should not be the value of the goods, but the value of the plaintiff's interest at the time of the trespass, which the court, being asked to fix, fixed at a nominal amount, Lord Campbell, in his judgment, saying,—*“If the action had been against a third party, the case would have been different.”* This case was followed in 1860 by *Chinery v. Viall* <sup>(5)</sup>. In that case the plaintiff, having bought some sheep from the defendant on credit, had left them in the custody of the defendant, who, without any default or refusal to pay on the part of the plaintiff, sold the sheep before the plaintiff arrived to take them away; and it was held that, though there was a conversion of the sheep for which the defendant was liable, the measure of damage was not the value of the sheep, but the loss sustained by the plaintiff by not having the sheep delivered to him, which, according to the finding of the jury, was £5. It seems difficult to reconcile this case with that of *Gillard v. Brittan* <sup>(6)</sup>, mentioned above, and perhaps it must be taken to have overruled that case; but it was, like *Brierly v. Kendall* <sup>(3)</sup>, \*a case which arose between [508 the immediate parties to a transaction, and not between

<sup>(1)</sup> 17 C. B. (N.S.), at p. 297.

<sup>(2)</sup> 18 C. B. (N.S.), 479; 34 L. J. (C.P.), 193.

<sup>(3)</sup> 18 C. B. (N.S.), 479; 34 L. J. (C.P.), 193.

<sup>(4)</sup> 11 C. B. (N.S.), 683; 31 L. J. (C.P.),

<sup>(5)</sup> 5 H. & N., 288; 29 L. J. (Ex.), 180.

<sup>(6)</sup> 8 M. & W., 575; 11 L. J. (Ex.), 133.

<sup>(7)</sup> 17 Q. B., 237; 21 L. J. (Q.B.), 161.

1878

Johnson v. Lancashire and Yorkshire Railway Co.

strangers. . So also were the cases of *Toms v. Wilson*<sup>(1)</sup>, and *Johnson v. Stear*<sup>(2)</sup>, which were relied upon by the defendants.

The questions raised in the present case are, whether any of the cases in which the measure of damages has been held to be other than the value of the goods apply to a case where the defendant is a stranger, and whether the defendants in this case are to be regarded as strangers to the plaintiffs within the meaning of that word used in the cases, or whether any such relation exists as to enable them to rely upon any qualification of the *prima facie* rule. In *Chinery v. Viall*<sup>(3)</sup>, Bramwell, B., makes the distinction, and suggests the alternative effect, as follows<sup>(4)</sup>: "It is not to be understood that, though in the present case the plaintiff cannot recover more, if a stranger had converted the goods the plaintiff would not have been entitled, as against him, to recover the whole amount of the value or proceeds. That might depend upon whether the plaintiff would be liable to the seller for the contract price, and probably in such a case he would, for there the seller would be in no default; and, if he could not deliver the goods owing to the wrongful act of a third party, it may be that he could recover the whole price, and the vendee would be entitled to recover the amount from the stranger."

It was contended by the defendants that, by reason of what had passed between Lockwoods and the plaintiffs, and between the plaintiffs and the defendants, the Wigan Wagon Company, the latter could not be looked upon as strangers, nor could Lockwoods' right to payment be regarded, inasmuch as they had rejected the wagons as not according to sample. I am, however, unable to find any authority for holding that in this case the plaintiffs are not entitled to deal with either of the defendants as mere wrongdoers. The defendants, the railway company, indemnified by the Wigan Wagon Company, hand back to them the wagons which 509] they held to the order of the plaintiffs, \*after informing the Wigan Wagon Company that they could do nothing without the plaintiffs' authority. The defendants, the Wigan Wagon Company, had no relations with the plaintiffs, except that, for their own advantage, they had agreed with Lockwoods that the plaintiffs, with Lockwoods' authority, should *pay* them direct for the wagons, not that they would be *liable* to them in any way, or escape from

(1) 4 B. & S., 442; 32 L. J. (Q.B.), 382.

(3) 5 H. & N., 288, at p. 295.

(2) 15 C. B. (N.S.), 330; 33 L. J. (C.P.), 130.

(4) 17 Q. B., 937; 21 L. J. (Q.B.), 161.

liability to Lockwoods. It would be impossible for me, upon the evidence before me, to estimate with any certainty the ultimate loss to the plaintiffs by reason of the conversion: nor do I see how any jury could in any action between these parties have inquired into all the circumstances necessary to be ascertained before they could assess the ultimate loss. The case of *Mulliner v. Florence* (<sup>1</sup>), decided in the present year, is an authority for the plaintiffs. There the opinion of Williams, J., in *Johnson v. Stear* (<sup>2</sup>), is cited with approbation,—“The true doctrine, as it seems to me, is, that, whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages.” In the present case, as against either of the defendants, I think the plaintiffs could have so held the property.

On the whole, therefore, I am of opinion that the *prima facie* rule applies to this case, and that there is nothing to displace it, and that the defendants are liable to pay the value of the wagons at the time of the conversion, which were assessed by the jury at £646, and I give judgment for that sum and costs.

*Judgment accordingly.*

Solicitors for plaintiffs: *Van Sandau & Cumming*, for J. T. Belk & Parrington, Middlesborough.

Solicitors for defendants: *Clarke, Woodcock & Rylands*, for T. A. & J. Grundy & Co., Manchester.

(<sup>1</sup>) 3 Q. B. D., 484, at p. 491; 25 Eng. R., 390, 396      (<sup>2</sup>) 15 C. B. (N.S.), 330, at p. 340.

[4 Common Pleas Division, 1.]

Nov. 25, 1878.

## 1] \*BENT V. THE WAKEFIELD AND BARNSELY UNION BANK.

*Reward for the Apprehension of a Felon—Criminal surrendering himself.*

G., having been guilty of forgery, absconded. The defendants published a handbill offering a reward of £200 "to any person or persons giving such information to A., superintendent of police, Dewsbury, or to H., superintendent of police, Wakefield, as will lead to the apprehension of the said G."

On the 30th of November, 1877, a person presented himself at the police office, Exeter, and asked for the chief constable (the plaintiff). On seeing him, the man (who was G.) said, "You hold a warrant for me; I am wanted for forgery." The plaintiff left the man in a private room, and, on searching the police gazette and finding a notice therein, "W. G. wanted for forgery," telegraphed to the superintendent of police at Dewsbury, "Do you hold warrant for the apprehension of W. G. for forgery?" Receiving an answer, "I still hold warrant for G., and should like him to be apprehended," the plaintiff *apprehended* and charged the man, who was ultimately convicted.

In answer to questions left to them, the jury found that G. was not in custody before the telegram was sent; but they were unable to agree as to whether or not he had given his name before it was sent:

*Held*, that the plaintiff was not entitled to claim the reward,—the apprehension of G. not being the consequence of the plaintiff's information, but of the criminal surrendering himself to justice.

ACTION for £200, being a reward offered for the apprehension of one William Glover.

2] \*The cause was tried before Grove, J., at the last summer assize for Bristol. The material facts are set out in the judgment.

The case was heard on further consideration before Grove, J., on the 18th instant, when

A. Charles, Q.C. (*St. Aubyn* and *Austin*, with him), for the plaintiff, cited *Smith v. Moore* (\*) and *England v. Davidson* (\*).

H. T. Cole, Q.C., and *Templer*, for the defendants, referred to *Lancaster v. Walsh* (\*), *Thatcher v. England* (\*), and *Cowles v. Dunbar* (\*).

A. Charles, Q.C., was heard in reply.

*Cur. adv. vult.*

Nov. 25. GROVE, J., delivered judgment.

This case was tried before me at Bristol at the last summer assize. It was an action for a reward of £200 offered in a published handbill by the defendants, in the following terms:

(\*) 1 C. B., 438.

(\*) 11 Ad. & E., 856.

(\*) 4 M. & W., 16.

(\*) 3 C. B., 254.

(\*) 2 C. & P., 565.



“£200. Whereas, on the 26th of June last, William Glover, shoddy and mungo dealer, of Ossett, absconded from Ossett, after committing various forgeries on several manufacturing firms in the West Riding of Yorkshire :

“ Notice is hereby given that the above reward will be paid to any person or persons giving such information to Mr. W. Airton, superintendent of police, Dewsbury, or to Mr. W. Halls, superintendent of police, Wakefield, as will lead to the apprehension of the said William Glover.

“ West Riding Police Office, Wakefield, 27th July, 1877.”

The plaintiff's case, on which my judgment must be founded, was, shortly stated, as follows: On the 30th of November, 1877, a person presented himself at the police office, Exeter, and on the plaintiff, the chief constable for Exeter, being sent for, the man, who was in fact Glover, said, according to the plaintiff's evidence, “You hold a warrant for me: I am wanted for forgery.” The plaintiff asked his name and who he was. He said, “You know already, and hold the warrant.” Some further conversation took place. The plaintiff said he appeared out of his [3 mind, and told him he had been drinking, and recommended him to go to a hotel. The plaintiff left him in a private room, searched the police gazette, and found the name “William Glover wanted for forgery.” He got him to take off his hat, and said, “I satisfied myself, after reading the police gazette, when he took his hat off.” The plaintiff then telegraphed to Mr. Airton, superintendent at Dewsbury, “Do you hold warrant for the apprehension of William Glover for forgery?” and received a telegram in return, “I still hold warrant for Glover, and should like him to be apprehended.” Upon that, the plaintiff apprehended and charged him; and he was ultimately convicted.

For the defendants evidence was given to prove that Glover gave his name before the telegram was sent; and also that he was taken into custody before it was sent. I left these two questions to the jury, and they found that Glover was not in custody before the telegrams; but could not agree, and, after being locked up, were discharged as to the first question,—counsel agreeing that they would accept the finding on the second for the purposes of the case.

The point reserved and argued before me on further consideration was, whether or not the plaintiff was entitled to the reward. For the plaintiff it was argued that he was the person to be taken to have given the information leading to the apprehension, within the meaning of the handbill. For

1878

Johnson v. Lancashire and Yorkshire Railway Co.

strangers. So also were the cases of *Toms v. Wilson* (\*), and *Johnson v. Stear* (\*), which were relied upon by the defendants.

The questions raised in the present case are, whether any of the cases in which the measure of damages has been held to be other than the value of the goods apply to a case where the defendant is a stranger, and whether the defendants in this case are to be regarded as strangers to the plaintiffs within the meaning of that word used in the cases, or whether any such relation exists as to enable them to rely upon any qualification of the *prima facie* rule. In *Chinery v. Viall* (\*), Bramwell, B., makes the distinction, and suggests the alternative effect, as follows (\*): "It is not to be understood that, though in the present case the plaintiff cannot recover more, if a stranger had converted the goods the plaintiff would not have been entitled, as against him, to recover the whole amount of the value or proceeds. That might depend upon whether the plaintiff would be liable to the seller for the contract price, and probably in such a case he would, for there the seller would be in no default; and, if he could not deliver the goods owing to the wrongful act of a third party, it may be that he could recover the whole price, and the vendee would be entitled to recover the amount from the stranger."

It was contended by the defendants that, by reason of what had passed between Lockwoods and the plaintiffs, and between the plaintiffs and the defendants, the Wigan Wagon Company, the latter could not be looked upon as strangers, nor could Lockwoods' right to payment be regarded, inasmuch as they had rejected the wagons as not according to sample. I am, however, unable to find any authority for holding that in this case the plaintiffs are not entitled to deal with either of the defendants as mere wrongdoers. The defendants, the railway company, indemnified by the Wigan Wagon Company, hand back to them the wagons which 509] they held to the order of the plaintiffs, \*after informing the Wigan Wagon Company that they could do nothing without the plaintiffs' authority. The defendants, the Wigan Wagon Company, had no relations with the plaintiffs, except that, for their own advantage, they had agreed with Lockwoods that the plaintiffs, with Lockwoods' authority, should *pay* them direct for the wagons, not that they would be *liable* to them in any way, or escape from

(\*) 4 B. & S., 442; 32 L. J. (Q.B.), 382.

(\*) 5 H. & N., 288, at p. 295.

(2) 15 C. B. (N.S.), 330; 33 L. J. (C.P.), 130.

(4) 17 Q. B., 937; 21 L. J. (Q.B.), 161.

liability to Lockwoods. It would be impossible for me, upon the evidence before me, to estimate with any certainty the ultimate loss to the plaintiffs by reason of the conversion: nor do I see how any jury could in any action between these parties have inquired into all the circumstances necessary to be ascertained before they could assess the ultimate loss. The case of *Mulliner v. Florence* (\*), decided in the present year, is an authority for the plaintiffs. There the opinion of Williams, J., in *Johnson v. Stear* (\*), is cited with approbation,—“The true doctrine, as it seems to me, is, that, whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages.” In the present case, as against either of the defendants, I think the plaintiffs could have so held the property.

On the whole, therefore, I am of opinion that the *prima facie* rule applies to this case, and that there is nothing to displace it, and that the defendants are liable to pay the value of the wagons at the time of the conversion, which were assessed by the jury at £646, and I give judgment for that sum and costs.

*Judgment accordingly.*

Solicitors for plaintiffs: *Van Sandau & Cumming*, for J. T. Belk & Parrington, Middlesborough.

Solicitors for defendants: *Clarke, Woodcock & Rylands*, for T. A. & J. Grundy & Co., Manchester.

(\*) 3 Q. B. D., 484, at p. 491; 25 Eng. R., 390, 396      (\*) 15 C. B. (N.S.), 330, at p. 340.

1878

Johnson v. Lancashire and Yorkshire Railway Co.

strangers. So also were the cases of *Toms v. Wilson* (\*), and *Johnson v. Stear* (\*), which were relied upon by the defendants.

The questions raised in the present case are, whether any of the cases in which the measure of damages has been held to be other than the value of the goods apply to a case where the defendant is a stranger, and whether the defendants in this case are to be regarded as strangers to the plaintiffs within the meaning of that word used in the cases, or whether any such relation exists as to enable them to rely upon any qualification of the *prima facie* rule. In *Chinery v. Viall* (\*), Bramwell, B., makes the distinction, and suggests the alternative effect, as follows (\*): "It is not to be understood that, though in the present case the plaintiff cannot recover more, if a stranger had converted the goods the plaintiff would not have been entitled, as against him, to recover the whole amount of the value or proceeds. That might depend upon whether the plaintiff would be liable to the seller for the contract price, and probably in such a case he would, for there the seller would be in no default; and, if he could not deliver the goods owing to the wrongful act of a third party, it may be that he could recover the whole price, and the vendee would be entitled to recover the amount from the stranger."

It was contended by the defendants that, by reason of what had passed between Lockwoods and the plaintiffs, and between the plaintiffs and the defendants, the Wigan Wagon Company, the latter could not be looked upon as strangers, nor could Lockwoods' right to payment be regarded, inasmuch as they had rejected the wagons as not according to sample. I am, however, unable to find any authority for holding that in this case the plaintiffs are not entitled to deal with either of the defendants as mere wrongdoers. The defendants, the railway company, indemnified by the Wigan Wagon Company, hand back to them the wagons which 509] they held to the order of the plaintiffs, \*after informing the Wigan Wagon Company that they could do nothing without the plaintiffs' authority. The defendants, the Wigan Wagon Company, had no relations with the plaintiffs, except that, for their own advantage, they had agreed with Lockwoods that the plaintiffs, with Lockwoods' authority, should *pay* them direct for the wagons, not that they would be *liable* to them in any way, or escape from

(\*) 4 B. & S., 442; 32 L. J. (Q.B.), 382.

(\*) 5 H. & N., 288, at p. 295.

(2) 15 C. B. (N.S.), 330; 33 L. J. (C.P.), 130.

(\*) 17 Q. B., 937; 21 L. J. (Q.B.), 161.

liability to Lockwoods. It would be impossible for me, upon the evidence before me, to estimate with any certainty the ultimate loss to the plaintiffs by reason of the conversion: nor do I see how any jury could in any action between these parties have inquired into all the circumstances necessary to be ascertained before they could assess the ultimate loss. The case of *Mulliner v. Florence* (\*), decided in the present year, is an authority for the plaintiffs. There the opinion of Williams, J., in *Johnson v. Stear* (\*), is cited with approbation,—“The true doctrine, as it seems to me, is, that, whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages.” In the present case, as against either of the defendants, I think the plaintiffs could have so held the property.

On the whole, therefore, I am of opinion that the *prima facie* rule applies to this case, and that there is nothing to displace it, and that the defendants are liable to pay the value of the wagons at the time of the conversion, which were assessed by the jury at £646, and I give judgment for that sum and costs.

*Judgment accordingly.*

Solicitors for plaintiffs: *Van Sandau & Cumming*, for J. T. Belk & Parrington, Middlesbrough.

Solicitors for defendants: *Clarke, Woodcock & Rylands*, for T. A. & J. Grundy & Co., Manchester.

(\*) 3 Q. B. D., 484, at p. 491; 25 Eng. R., 390, 396      (\*) 15 C. B. (N.S.), 330, at p. 340.

1878

Bent v. Wakefield Bank.

[4 Common Pleas Division, 1.]

Nov. 25, 1878.

1] \*BENT V. THE WAKEFIELD AND BARNSELY UNION BANK.

*Reward for the Apprehension of a Felon—Criminal surrendering himself.*

G., having been guilty of forgery, absconded. The defendants published a handbill offering a reward of £200 "to any person or persons giving such information to A., superintendent of police, Dewsbury, or to H., superintendent of police, Wakefield, as will lead to the apprehension of the said G."

On the 30th of November, 1877, a person presented himself at the police office, Exeter, and asked for the chief constable (the plaintiff). On seeing him, the man (who was G.) said, "You hold a warrant for me; I am wanted for forgery." The plaintiff left the man in a private room, and, on searching the police gazette and finding a notice therein, "W. G. wanted for forgery," telegraphed to the superintendent of police at Dewsbury, "Do you hold warrant for the apprehension of W. G. for forgery?" Receiving an answer, "I still hold warrant for G., and should like him to be apprehended," the plaintiff *apprehended* and charged the man, who was ultimately convicted.

In answer to questions left to them, the jury found that G. was not in custody before the telegram was sent; but they were unable to agree as to whether or not he had given his name before it was sent:

*Held*, that the plaintiff was not entitled to claim the reward,—the apprehension of G. not being the consequence of the plaintiff's information, but of the criminal surrendering himself to justice.

ACTION for £200, being a reward offered for the apprehension of one William Glover.

2] \*The cause was tried before Grove, J., at the last summer assize for Bristol. The material facts are set out in the judgment.

The case was heard on further consideration before Grove, J., on the 18th instant, when

A. Charles, Q.C. (*St. Aubyn* and *Austin*, with him), for the plaintiff, cited *Smith v. Moore* (¹) and *England v. Davidson* (²).

H. T. Cole, Q.C., and *Templer*, for the defendants, referred to *Lancaster v. Walsh* (³), *Thatcher v. England* (⁴), and *Cowles v. Dunbar* (⁵).

A. Charles, Q.C., was heard in reply.

*Cur. adv. vult.*

Nov. 25. GROVE, J., delivered judgment.

This case was tried before me at Bristol at the last summer assize. It was an action for a reward of £200 offered in a published handbill by the defendants, in the following terms:

(¹) 1 C. B., 438.

(²) 11 Ad. & E., 856.

(³) 4 M. & W., 16.

(⁴) 3 C. B., 254.

(⁵) 2 C. & P., 565.

“£200. Whereas, on the 26th of June last, William Glover, shoddy and mungo dealer, of Ossett, absconded from Ossett, after committing various forgeries on several manufacturing firms in the West Riding of Yorkshire :

“ Notice is hereby given that the above reward will be paid to any person or persons giving such information to Mr. W. Airton, superintendent of police, Dewsbury, or to Mr. W. Halls, superintendent of police, Wakefield, as will lead to the apprehension of the said William Glover.

“ West Riding Police Office, Wakefield, 27th July, 1877.”

The plaintiff's case, on which my judgment must be founded, was, shortly stated, as follows : On the 30th of November, 1877, a person presented himself at the police office, Exeter, and on the plaintiff, the chief constable for Exeter, being sent for, the man, who was in fact Glover, said, according to the plaintiff's evidence, “ You hold a warrant for me : I am wanted for forgery.” The plaintiff asked his name and who he was. He said, “ You know already, and hold the warrant.” Some further conversation took place. The plaintiff said he appeared out of his [3 mind, and told him he had been drinking, and recommended him to go to a hotel. The plaintiff left him in a private room, searched the police gazette, and found the name “ William Glover wanted for forgery.” He got him to take off his hat, and said, “ I satisfied myself, after reading the police gazette, when he took his hat off.” The plaintiff then telegraphed to Mr. Airton, superintendent at Dewsbury, “ Do you hold warrant for the apprehension of William Glover for forgery ? ” and received a telegram in return, “ I still hold warrant for Glover, and should like him to be apprehended.” Upon that, the plaintiff apprehended and charged him ; and he was ultimately convicted.

For the defendants evidence was given to prove that Glover gave his name before the telegram was sent ; and also that he was taken into custody before it was sent. I left these two questions to the jury, and they found that Glover was not in custody before the telegrams ; but could not agree, and, after being locked up, were discharged as to the first question,—counsel agreeing that they would accept the finding on the second for the purposes of the case.

The point reserved and argued before me on further consideration was, whether or not the plaintiff was entitled to the reward. For the plaintiff it was argued that he was the person to be taken to have given the information leading to the apprehension, within the meaning of the handbill. For

1878

Bent v. Wakefield Bank.

the defendants, that the criminal, Glover, had given the information himself, and, secondly, that, on grounds of public policy, the plaintiff was not entitled to the reward.

I am of opinion that the defendants are entitled to judgment.

It was not contended that the mere fact of being the person who first communicated with Airtion would be sufficient alone to entitle the plaintiff to succeed, supposing the information to have been given to the plaintiff by other than the criminal himself: indeed, the very able and learned counsel for the plaintiff said, in answer to me,—though I do not wish and ought not to tie him to his admission,—that, if Glover had given information to Airtion, Airtion would have been entitled to the reward. I think he could hardly have avoided such admission. Airtion and Halls, it seems 4] \*to me, are persons mentioned as proper to be communicated with, but if the information had been given direct to those offering the reward and had led to the apprehension, I should consider that sufficient. The criminal himself, and not the constable, was, I think, here the person who gave the information which led to the apprehension.

In *Lancaster v. Walsh* <sup>(1)</sup>, where no person was named to receive the information, but the reward was to be given “on application to the defendant.” Parke, B., says: “It seems to me that any communication to the constable whose duty it was to search for the offender was within the terms of the handbill, although there was no proof of a communication to the defendant himself.” In the same case it is held by the same learned judge that “the party who first gave the information, and he alone, is to have the benefit.” And Alderson, B., says: “Information means the communication of material facts for the first time.”

It appears to me that in the present case the first information given to a person authorized to act was that given by the criminal himself; and although he, on grounds of public policy, might not be entitled to the reward, still, where a constable, who may apprehend a criminal <sup>(2)</sup>, is the mere channel of communication, and only makes inquiries for the purpose of satisfying himself, he is not the person giving the information within the true meaning of the advertisement; the apprehension is not the consequence of the constable’s information, but of the criminal surrendering himself to justice. To use the words of Tindal, C.J., in

<sup>(1)</sup> 4 M. & W., 16.

<sup>(2)</sup> Snowden on Constables, p. 152; Com. Dig. *Leet* (M. 9). (M. 10), *Justices of Peace* (B. 79)



*Thatcher v. England*(<sup>1</sup>).—"the clue once found, the plaintiff in apprehending Walker did no more than his ordinary duty." It was argued that, in the case of *Thatcher v. England*(<sup>1</sup>), the first information was given by the criminal, and yet the person who communicated that information was held to be the party entitled. But there the communication by the criminal was not to any one authorized to act in apprehending or procuring his apprehension, but to a person whom seemingly he considered a friend, for the purpose of borrowing money to enable him to \*go to London and [5 dispose of the property stolen. The communication by the criminal there was not in the nature of information to be acted upon for the purpose of his apprehension, and, had the person to whom it was made kept the secret, would not have led to the conviction. In that case it was also held that, though the first police constable to whom the communication was made by his activity and perseverance succeeded in tracing and recovering nearly the whole of the property and in procuring evidence to convict the thief, he was not entitled to the reward.

The cases mainly relied on for the plaintiff were *England v. Davidson*(<sup>2</sup>) and *Smith v. Moore*(<sup>3</sup>). The first of these cases bears more on the question of public policy than on the point to which I have hitherto adverted. It was there held, on demurrer, that the fact of the person giving the information being a constable did not necessarily disentitle him on the ground of want of consideration, it being his duty to discover and apprehend felons, or on grounds of public policy. In that case, the averments in the declaration were more general, viz., that the plaintiff did give such information as led to the conviction, and in the plea that the plaintiff was and is a constable of the district, and that it was his duty to give every information which might lead to the conviction, and to apprehend him. The short judgment of the court, delivered by Lord Denman, is as follows: "I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law unless the grounds for so deciding were very clear." All that that case decides is that a constable, as such, is not disentitled to a reward of this description, or necessarily disentitled as against public policy. In *Smith v. Moore*(<sup>3</sup>), the plaintiff, a police constable then temporarily suspended, apprehended a burglar who after his apprehension voluntarily confessed: the con-

(<sup>1</sup>) 3 C. B., 254, at p. 263.

(<sup>2</sup>) 11 Ad. & E., 856.

(<sup>3</sup>) 1 C. B., 438.

1878

Bent v. Wakefield Bank.

stable was held entitled to the reward. There is in that case the obvious distinction from the present, that the confession was made after apprehension effected by the person claiming the reward, and who by his suspicions, and apprehending on the strength of them, had already done much, and in the judgment of the court enough, to earn it.

6] \*On the question of public policy I am bound by the case of *England v. Davidson* <sup>(1)</sup> so far as the judgment in that case extends; and although there may be some distinction as to this point between that case and the present, yet, in deciding a case on the ground of public policy, the decision should be based on some broad principle, and one capable of general application.

I am unable to see any general principle other than that argued in *England v. Davidson* <sup>(1)</sup>, viz., that a constable is bound by his duty, the duty of his office, to seek for criminals and to use his utmost efforts to bring them to justice. There are strong arguments of expediency, touching the administration of justice and the interests of the state, why constables should not be allowed to receive rewards. The expectation of rewards would offer great temptation to delay an active search, by which delay the criminal might escape, or, in a case like the present, to delay taking into custody a criminal who gives himself up, so that the constable might appear to use exertions to procure complete information, and for that to claim the reward. There would also be a temptation, particularly to those constables in the detective service, to look to bribes or to seek promises of reward from persons anxious to recover their property, and unless such were offered to be inert in their efforts. But, although the judgment in *England v. Davidson* <sup>(1)</sup> does not enter upon these questions, I must assume they were present to the minds of the judges who decided that case.

Whatever my own opinion may be, it seems to me that I cannot without over-subtle refinement apply to this case any general principle of public policy which is not involved in that case, and that the decision, if it is to be reviewed, must be reviewed in a court of appeal. The first point is sufficient to decide this case; and I give judgment for the defendants, with costs.

*Judgment for the defendants.*

Solicitors for plaintiff: *Clarke, Rawlins & Clarke*, for H. D. Barton, Exeter.

Solicitors for defendants: *Torr, Janeway & Co.*, for Stewart & Son, Wakefield.

<sup>(1)</sup> 11 Ad. & E., 856.

The principal case is reported, with note, 18 Amer. Law Reg. (N.S.), 291.

See *Moak's Van Santvoord's Pl.*, 417, 889, and authorities cited.

A public officer, whose duty it is to arrest all persons charged with or suspected of the commission of a crime, cannot claim any other or further remuneration for his services than the fees allowed by law.

Whenever an officer makes an arrest he is supposed to be acting in his official capacity; and where he performed the duty of sheriff, believing he was acting within the authority derived from law, the court will not allow him to change his relation and assume that of a private individual: *Rea v. Smith*, 2 Handy (Ohio), 193; *Hayden v. Songer*, 56 Ind., 42, 26 Am. R., 1, 5 note.

A sheriff is not entitled to additional compensation for personal attention rendered to prisoners, beyond payment for their board. The fees and salary of the officer include payment for such services: *Grubb v. Louisa County*, 40 Iowa, 314.

A constable not being bound by law to go out of his county to arrest one charged with crime, if he makes a special agreement with one to do so for an amount in excess of the statutory fees allowed, he is not liable to the penalty given by statute for taking illegal fees, when such sum is voluntarily paid, but it would be otherwise if he should coerce payment: *People v. Rainey*, 89 Ills., 84.

When the governor officially signs a proclamation offering a reward for the apprehension and delivery to the proper jailer of a fugitive from justice, and it is entered on the executive journal, the offer is complete, without further publication: *Auditor v. Ballard*, 9 Bush, 572.

Where the offer of a reward is made by public proclamation, it may, before rights have accrued under it, be withdrawn through the same channel in which it was made. No contract arises under such offer until its terms are complied with. The fact that the claimant of such reward was ignorant of its withdrawal is immaterial: *Shuey v. U. S.*, 92 U. S. R., 73.

If before the offer of the reward is withdrawn an individual performs the service for which the reward was offered, it is the ordinary case of labor done

and performed on request, and the contract to pay the stipulated compensation becomes enforceable: *Auditor v. Ballard*, 9 Bush (Ky.), 572.

The person performing such service is entitled to the reward offered, even if at the time of performance he was not aware that it had been offered: 9 Bush (Ky.), 572.

To entitle a person to a reward offered for the recovery, or for information leading to the recovery of property lost, he must show a rendition of the services required, after a knowledge of, and with a view of obtaining the offered reward. The finding of the property and advertisement thereof without knowledge of the offer, or the giving of information as to the whereabouts of the property, which information does not, in fact, lead to its recovery, does not entitle him to the reward: *Howland v. Lounds*, 51 N. Y., 604.

In an action to recover a reward offered by the defendants for the arrest and conviction of any party guilty of a specified crime, the findings of the court were in favor of the plaintiff, with the exception of the finding that none of the acts of the plaintiff were done with a view of obtaining said reward, or any part of it. Held, that he was not entitled to recover. *Hewitt v. Anderson*, 56 Cal., 476.

In an action for a reward offered for the return of lost goods by a party who has performed the prescribed condition of it, by finding and returning them to the owner, he will be entitled to recover it, although he did not know at the time he returned them that any reward had been offered for them: *Eagle v. Smith*, 4 Houst. (Del.), 293.

Where an advertisement is published offering a reward for information in respect to or for a return of lost property, an acceptance of it by any person who is able to give the information asked, or to return the property, creates a valid contract, and on compliance with its terms, an action is maintainable to recover the reward offered: *Pierson v. Morch*, 82 N. Y., 503.

One who offers a specified reward for the recovery of lost property, is bound to pay it on the return of the property, pursuant to the offer. The fact that it is returned by an agent or lawyer, who refuses to disclose the name of the finder, his client, and who makes

1878

Bent v. Wakefield Bank.

threats if the full reward be not paid, does not entitle the payer to recover back the reward: *Grady v. Crook*, 2 Abb. N. C., 53; affirmed 72 N. Y., 612.

Where a "liberal reward" was offered for information leading to the apprehension of a fugitive from justice, and a specific sum for his apprehension; held, that a party giving the information which led to the arrest was entitled to the "liberal reward," but not to the specific sum, unless he in fact apprehended the fugitive, or the arrest was made by his agents: *Shuey v. U. S.*, 92 U. S. R., 73.

Reliable information as to facts upon which the future price of a stock will depend, is a sufficient consideration to uphold an agreement or contract in relation to such stock. Such information being concededly of great value, is just as effective to take the case out of the statute of frauds as if a cash payment had then been made.

One who offers a reward for information is bound by his contract to the person who responds to his offer. The same rule applies with equal force where the information is proffered by one and accepted by another, under a contract by him to carry certain stocks for the benefit and profit of the party imparting the information.

Where plaintiff, being in possession of valuable information in relation to a certain stock, which he proposed to impart to defendant upon condition that if defendant should consider it sufficiently important to warrant his acting upon it, he (defendant) should hold 5,000 shares of such stock at cost for plaintiff's account, and at his risk and subject to his orders, for a period of sixty or ninety days, to which defendant assented; and thereupon plaintiff imparted said information, which defendant accepted and acted upon, pronouncing it the best "point" he had heard of in a long time. Held, that the moment the information was given, and the transaction assented to by defendant, it was an executed contract; and the defendant bore the same relation to the plaintiff, in regard to this stock, as stockbrokers ordinarily bear to the customers for whom they are carrying stocks.

The plaintiff became the owner and the defendant the pledgee of the stock,

charged also with the further duty to continue to carry, without margin, until directed to sell as provided by the agreement.

The title to the stock (5,000 shares) was in the plaintiff, and he was entitled to an immediate delivery, at any time, of the specific stock agreed to be set apart and held by defendant for him, on tendering to the defendant, the price agreed upon for the same, with accrued interest: *White v. Drew*, 56 How. Pr., 53.

An advertisement in the name of a town, signed by the selectmen, offered a reward of \$500 to any person who should be the means of detecting and convicting the person who set fire to a barn. An application for the payment of the reward alleged that the selectmen of the town offered a reward of \$200 to any person who should make discovery and give information against the person guilty of burning the barn, so that he might be tendered to justice and convicted. Held, that there was no such variance between the application and the proof as to prevent a recovery.

A statute provided that whenever any high crime or misdemeanor should have been committed in any town, the selectmen of the town might offer a reward, not exceeding two hundred dollars, to the person who should make discovery and give information against any other person guilty of such crime or misdemeanor, so that he might be tendered to justice and convicted.

A barn was fired by S., who was procured to do it by G. S. was arrested, convicted and sentenced to the state prison. While in jail and before trial, and after the reward was offered, he voluntarily disclosed to the attorney for the State the fact of G.'s guilt, but his statements were uncorroborated, and G. was not then prosecuted. Nearly three years afterward, the petitioner, being aware of the disclosure made by S., which was generally known, discovered additional and corroborative testimony, applied to the proper authorities, and caused the prosecution of G., and the steps which he took were the means of his conviction. Without the disclosure made by S. no conviction could have been obtained, nor with that uncorroborated. Held, that the statute ought to receive an equitable, not a strict or

technical, construction, and that so construed the petitioner was fully within its provisions; and that the offer of reward was not barred by lapse of time, but was binding until the statute of limitation had run against the crime: *Matter of Kelly*, 39 Conn., 159.

Where one employs another to pursue and capture a horse thief, and pays the expenses, he will be entitled to the reward offered by the county for the apprehension and conviction of such thief, on the familiar maxim "*Qui facit per alium, facit per se*."

Where a county offers a reward for the pursuit and arrest, beyond the limits of the county, of any person guilty of stealing any horse, etc., within the county and from a citizen thereof, to be paid on conviction of the thief, the pursuit of the thief to another State under a warrant for his apprehension and a requisition of the governor of this State upon the governor of such other State, and bringing the thief back under such warrant, and his conviction, will entitle the person procuring the same to be done to the reward, notwithstanding such thief may have been apprehended and detained in such other State, by officers there: *County of Montgomery v. Robinson*, 85 Ills., 174.

A., having been robbed of money, promised B. one hundred dollars if he would tell him who got it; B. told him C. got it. It turned out that C. had an accomplice, D., with whom he shared the money: Held, that the consideration of the promise was substantially performed: *Gilkey v. Bailey*, 2 Harr. (Del.), 359.

An offer, by a party who has been robbed, of a reward for the arrest and conviction of the robbers, is not earned by one who merely communicates to the party robbed, his suspicions that a certain person is guilty, with a statement that others are satisfied of his guilt, and that circumstances pointed strongly towards him, and who does not claim the reward until after the arrest and conviction of the robbers: *Burke v. Wells, Fargo & Co.*, 50 Cal., 218.

A prisoner in custody in Montgomery county, for an offence under the laws of the State committed in that county, was transferred, for safe keeping, from the jail of such county to the county

jail of Franklin county, and while confined there escaped from the jail. S., the sheriff of Montgomery county, offered a reward of \$50 for the delivery of the escaped prisoner to him at Independence, in said Montgomery county. D. and C. acting on the knowledge that a reward had been offered, and with a view to obtain it, captured and secured the prisoner and took him back to the county seat of Franklin county, and there met the sheriff of said Franklin county, who demanded the prisoner by virtue of his office, and D. and C. delivered up the prisoner to such sheriff as his legal custodian, and claimed the reward offered. Soon thereafter S. came to such county seat and received the prisoner from the sheriff of Franklin county, and took him back to Independence. Held, that D. and C. are entitled to the reward, notwithstanding the interposition of the sheriff of Franklin county, and notwithstanding that S. came to Franklin county and received the prisoner there instead of having him delivered at Independence: *Stone v. Dysert*, 20 Kansas, 123.

When the government offers a reward for information which shall lead to the "conviction" of persons illegally operating distilleries, the conditions of the offer will be deemed complied with, if there be a verdict of guilty, followed by a motion of the district attorney to suspend judgment on the payment of all costs by the prisoners. The informer's obligation in such a case ends with the verdict, and he is not responsible for the subsequent acts or inaction of the district attorney: *Williamis v. U. S.*, 12 Court of Claims Rep., 192.

Rewards offered for the apprehension and conviction of criminals are required to be paid, although there was no conviction, the conviction having been prevented by a dismissal of the indictments at the instance and request of attorneys employed to prosecute by the company which offered the rewards.

Several criminals, for whose arrest and conviction rewards were offered by the railroad company, were apprehended and indicted. Two of them confessed their guilt. The indictments against those two were dismissed, in order to use them as witnesses against the others the attorneys employed by

the company to assist in the prosecution indorsing and urging the dismissal:

Held, the counsel employed by the company to aid in the prosecution were, for the time being, representatives of the commonwealth, and were bound to labor honestly and earnestly for the conviction of the guilty, and also to act in accordance with their convictions as to the propriety and policy of prosecuting or dismissing the indictments.

In advising and procuring the dismissal of the indictments, the employed attorneys of the company acted within the scope of their authority, and in the discharge of a duty devolved upon them by the very nature of their employment, and they therefore acted for the company which, through them, prevented the conviction of the two guilty parties, and the company became liable to their captors for the reward offered for their apprehension and conviction: *Louisville and Nashville R. R. Co. v. Goodnight*, 10 Bush (Ky.), 552.

Declaration for a reward of \$300, offered by defendants to any person giving such information as would lead to the conviction of the murderer or murderers of certain persons therein named. Defendants pleaded that plaintiff did not give such information, etc., that the said murderer was not convicted, it appearing that the accused, while waiting his trial, committed suicide in jail. Upon demurrer, held, that the actual conviction of the party accused was a condition precedent to the recovery of the reward, and that the committing of suicide by the accused did not entitle the plaintiff to recover: *Fortier v. Wilson*, 11 U. C. Com. Pl., 495.

In mandamus against the state auditor, to compel the issue of a warrant for the amount of reward offered by the governor for the apprehension of the fugitive from justice, the fact that at the time of the arrest, the proclamation offering the reward was unrevoked, is not conclusive proof of the fact that the person arrested was at the time a fugitive: *State v. Auditor*, 61 Mo., 263.

In 1873 the governor offered a reward of \$600 for the arrest of a fugitive murderer. The statute allowed \$200 to any one arresting a fugitive from justice. In March, 1873, the legislature, by a special act, allowed \$600 to

the relator for arresting one S., a fugitive murderer, etc. Held, that as the statute only allowed \$200 compensation for the arrest of a fugitive murderer, the governor could not, by his proclamation, bind the state to pay a larger reward. But that the legislature, by a special act, having allowed the relator \$600, this was intended by the legislature as full and complete compensation, and not as cumulative to the statutory reward: *Jones v. Gibbs*, 51 Miss., 401.

Forty-four record books, some deeds, mortgages, and other papers of a county, having been stolen, the county officers deposited \$3,500 in the hands of A., upon condition that it should, upon the return of the stolen property, be paid to the person causing the return. It was also stipulated that the failure to "deliver some small paper or papers," should not invalidate the agreement. Within the time limited, A. received a paper signed by the deputy sheriff of the county, acknowledging the receipt of the record books, "also papers and small index books." He thereupon paid the money to the person presenting the receipt. The county then brought suit against A. to recover the money, alleging that some of the books were, upon their return, in such a damaged condition as to be rendered comparatively worthless, and that he had therefore not performed his contract.

Held, that A. being a simple bailee of the money deposited in his hands, without compensation, was not, in the absence of bad faith on his part, responsible for the condition of the property at the time of its return: *Eldridge v. Hill*, 97 U. S. R., 92.

An excessive and unreasonable reward offered by a public agent for the recovery of stolen property, will not bind the government, but the party will be entitled to recover reasonable compensation, to be estimated in the nature of a reward, i. e., as contingent upon success: *Gibbs v. U. S.*, 14 Court Claims R., 544.

In construing the statute authorizing and requiring the payment of rewards in certain cases (St. 1877, p. 92), held, that it has no application to offences committed against the United States, and tried in the United States courts,

but applies to persons who violate the State law, and who are arrested under process issued out of state courts, and who are therein convicted : *Sias v. Hallock*, 14 Nevada, 332. Interpleader lies against different persons claiming a reward : *Fargo v. Arthur*, 43 How. Pr., 193 ; *Rea v. Smith*, 2 Handy (Ohio), 193.

[4 Common Pleas Division, 7.]

Nov. 15, 1878.

\*LOVELL V. NEWTON.

[7

*Married Woman's Property Protection Act*, 1870 (33 & 34 Vict. c. 93), s. 1—"Earnings" of Wife—Business carried on "separately" from the Husband.

A., a butcher (not within the city of London), in consequence of confirmed intemperance, became incapable of continuing his business, and was removed to the workhouse infirmary suffering from delirium tremens. On his removal, a friend at various times lent his wife sums of money to enable her to purchase meat wherewith to carry on the business for the support of her family. She continued to do so for several months, her husband on his return from the infirmary never in any way interfering, but residing for part of the time in an upper room of the house. Meat which had been so purchased by the wife was seized in execution for a debt of the husband; and upon an interpleader summons the county court judge came to the conclusion,—whether as matter of law or of fact did not appear,—that the case was not within the *Married Woman's Property Act*, 1870. Upon appeal to a divisional court, it being agreed that the court should draw inferences from the facts stated by the judge:

*Held*, that the case disclosed such a separate trading by the wife as to warrant them in holding that the goods seized were the property of the wife.

#### APPEAL from the Shoreditch County Court.

This was an interpleader issue to try whether certain stock-in-trade seized by the bailiff of the county court under an execution in an action brought by the plaintiff, Lovell, against William Newton, was at the time of the seizure the property of the execution debtor or the separate property of the claimant, Ann Elizabeth Newton, his wife. The evidence of the claimant, upon which the case turned, was as follows:

"I am the claimant, the wife of William Newton, the defendant. Up to July, 1877, he carried on business as a butcher in High Street, Hoxton; but, becoming addicted to intemperance, he was subject to attacks of delirium tremens, and removed to the Hoxton workhouse. He did not leave me any stock or money. A friend (Mr. Garnham) lent me £70 to carry on the business. On the 27th of July, 1877, I bought meat with it, and repaid it to him on the Sunday after. The profit was £6 or £7. I have carried on the business in the same manner by the assistance of Mr. Garnham and other friends up to the time of the execution. I live out of the profits, and support myself and six children. I

1878

Lovell v. Newton.

pay the rent also. My husband came back, after he first 8] went \*away, in fourteen days. In twenty-one days he was again attacked with delirium tremens, and again removed. In three weeks he again returned, and has remained with me ever since. He lies in bed all day, and gets up and goes out in the evening; but he does not interfere in the business; and my friends would not assist me if he did. I pay no interest for these advances, though I have offered to do so. [Mr. Garnham's checks were produced.] The execution came in on the 16th of February last, and the stock of meat in the shop was seized. I had bought it with loans advanced, as before, by my friends. The execution came in for £52 4s. The meat seized was valued at £20, and Mr. Garnham lent me the money to pay out the execution."

On cross-examination, she said: "I had a cart which I used in the business. My husband bought it; and I have used it since his illness. An action was brought against my husband by the plaintiff for injury done by this cart on the 9th of November last, when my foreman was driving in my business. Judgment passed against my husband. I instructed Mr. Pyke, a solicitor, to act for me; not for my husband, who was incapable. I handed the summons to him, and he appeared for the defendant in the action, who was my husband."

The judge of the county court was of opinion that the case did not fall within the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93), and as a matter of form barred the claim, subject to the opinion of the court above.

An order *nisi* having been obtained (at chambers) to enter judgment for the plaintiff,

*J. Cook* showed cause: The judge of the county court was right in holding that the case did not fall within the Married Woman's Property Act, 1870. The 1st section of that act provides that "the wages and earnings of any married woman acquired or gained by her after the passing of this act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, 9] or property, shall be deemed and taken \*to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property." The 11th section, which may be referred



to, does not seem to carry the matter any further<sup>(1)</sup>. The facts disclosed upon the judge's notes do not show that the trade was carried on by the wife "separately from her husband" so as to exclude the presumption of agency and disable a creditor to sue him: *Smallpiece v. Dawes*<sup>(2)</sup>; *Laporte v. Costick*<sup>(3)</sup>. The business never ceased to be his business, though he had in consequence of his intemperate habits discontinued to conduct it. At all events, it was a question for a jury. In *Ashworth v. Outram*<sup>(4)</sup> the business had been carried on by the wife, and the stock-in-trade which was seized had been acquired by her "earnings" before the marriage, and the husband had never in any way interfered with it. That, therefore, is a very different case from this.

*Clay*, contra: *Ashworth v. Outram*<sup>(5)</sup> must govern this case. The wife was clearly carrying on the business for her own separate use apart from her husband. He was incapable of interfering, and he did not in fact interfere in its management. The persons who trusted her would not have done so if he had appeared in the business.

[LINDLEY, J.: The business and the stock could only become the property of the wife with the assent of the husband; and here the husband seems to have been incapable of giving assent. In *Ashworth v. Outram*<sup>(6)</sup> there was abundant evidence that the \*goods claimed by the adminis- [10  
tratrix of the husband were the separate property of the wife, independently of the act.]

Upon the construction of the act the assent of the husband is immaterial. The inference and the only inference to be drawn from the admitted facts here is, that the stock-in-trade was the produce of the wife's earnings; and, if the act protects the earnings, it must also protect the capital which produces them. The judgments of Lord Coleridge and Lord Justice James<sup>(7)</sup> are quite conclusive. In *Smallpiece v.*

(1) Sect. 11 enacts that "a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall by writing under his hand have agreed with her shall belong to her after marriage as her separate property; and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels

or other property purchased or obtained by means thereof, for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property."

(2) 2 C. & P., 40.

(3) 31 L. T., 434.

(4) 5 Ch. D., 923; 22 Eng. R., 550.

(5) 5 Ch. D., at pp. 937, 941; 22 Eng. R., 562, 565.

1878

Lovell v. Newton.

*Dawes* (1) there was no authority express or implied from the husband to the wife to carry on business so as to pledge his credit; and in *Laporte v. Costick* (2) it was found as a fact that the husband did exercise some control over the business.

[LINDLEY, J.: In *Ashworth v. Outram*, Malins, V.C., says (3): "When the agreement [to the wife's carrying on the business on her own individual account] is made previously to the marriage, since the consideration is valuable, the transaction will not only be obligatory upon the husband but also binding upon his creditors. When the agreement originates during the marriage, it will be void against his creditors, but good against himself."]

DENMAN, J.: Some difficulty has arisen in this case from the doubtful mode in which the county court judge has stated the facts, and his finding thereon. If the learned judge came to the conclusion that the case did not fall within the Married Woman's Property Act by reason of the fact of the husband living in the house, we should not be inclined to agree with him. The cases cited show that that circumstance would not be sufficient to defeat the act. But our difficulty is cleared away by the assent of the counsel to our deciding this appeal upon the facts as found, drawing all proper inferences from those facts, of course with regard to the decisions as to what is a separate trading of the wife within the meaning of the act. Though in the judgments in the Court of Appeal in *Ashworth v. Outram* (4) the decision seems to have gone mainly upon the rights of the married [1] woman apart from the \*statute, still Lord Coleridge in his judgment took a view which assists the claimant's case here. The question raised there was whether the stock-in-trade was part of the "earnings" of the wife; and he came to the conclusion that the act could not be practically applied if stock-in-trade in a going concern were not within the protection of the act. "What," he says, "is meant by a business, or a trade, or an occupation? I find it exceedingly well described, in language much better than I could use, in the case of *MacNeillie v. Acton* (5), the minutes in which I presume were drawn up by Sir George Turner himself. In that case the testator had directed that his trade should be carried on, and the question was what property was authorized to be employed for the purpose of carrying on that trade. I find in the minutes of the decree a decla-

(1) 2 C. &amp; P., 40.

(3) 5 Ch. D., at p. 932; 22 Eng. Rep., 562.

(2) 31 L. T., 434.

(4) 5 Ch. D., 937; 22 Eng. R., 562.

(5) 4 D. M. &amp; G., 744, 755.

ration that, according to the true construction of the will of the testator, 'the testator's executors were not authorized or empowered to continue the trade or business in his will mentioned otherwise than with or by means of the property, capital, stock, and effects which were embarked and employed therein at the time of the death of the said testator,'—clearly implying, and in fact declaring; that the extent of property, capital, stock, and effects which were embarked and employed in the business at the time of the death of the testator, the executors were permitted and justified in so using them. Then I may take it that, if the wages and earnings of a married woman are to be protected in an employment, the property, capital, stock, and effects embarked and employed in it at the time of the marriage, if they are allowed to be continued in the employment, and wages and earnings are allowed to be made therefrom, are protected by this section as necessary for the making such wages and earnings." And Lord Justice James agrees with him. We have, therefore, the opinions of two very learned judges that the stock used in the trade carried on as described in this case is within the act. Then comes the question whether this business was separately carried on by the wife within s. 1. The facts are these: The husband became addicted to intemperance to such an extent that, at the time the wife commenced carrying on the business on her own account, he had to be removed to the workhouse. After a short \*interval he recovered sufficiently to return to his [12] home; but he relapsed into his evil habits, had a second attack of delirium tremens, and was again removed to the infirmary. On recovering from this second attack, he again went home, and though he remained in the house, he never interfered with the business in any way, but his wife continued to carry it on as before with money borrowed from time to time by her from her own friends. Under these circumstances, and upon this state of facts, I am of opinion that we are warranted in drawing the inference that the wife was carrying on this business separately from her husband within the spirit and meaning of the act. If a jury had so found, no court would have quarrelled with their finding. Looking at the substance and intention of the act, which was to protect the fruits of the talent and industry of married women from being made liable for the debts of their husbands; and having a decision of the Court of Appeal that stock-in-trade is included within the term "earnings," I think we are fully justified, acting as a jury, in holding that Mrs. Newton was carrying on this business separately from

her husband, so as to protect the goods in question from being seized for his debt. I wish it to be understood that the only *law* we decide is, that the mere fact of the husband living in the house at the time the business is so being carried on does not deprive the wife of the protection afforded her by the act.

LINDLEY, J.: The case arises in this way: Under an execution against the husband, the bailiff of the county court seized certain stock-in-trade (meat) which was claimed by the wife as being her separate property; and the question is whether under the circumstances she can assert a title to the meat separately from her husband. The facts are very meagre; and but for the smallness of the amount involved, I should have liked to send the case back to be more fully stated. Having regard to the condition of the husband, and seeing the sources from which the money whereby the wife was enabled to carry on the business came, that the husband's credit was in no way pledged for it, and that he had for a period of six months never interfered at all with the business, though he must have known that his wife was [3] carrying it on without \*any assistance from him, I agree with my Brother Denman that we may fairly hold that the meat seized (I confine myself to that) was the property of the wife separately from her husband. It is not an immaterial fact that the money advanced to the wife was lent to her without interest. If the county court judge thought that the fact that the husband lived in the house at the time was conclusive of the question (as we are informed he did), I must say I should not have agreed with him. I arrive at this result because I think there is abundant evidence that the business was *for the time* the separate business of the wife.

*Judgment for the claimant*(<sup>1</sup>).

Solicitors for plaintiff: *G. J. & P. Vanderpump.*

Solicitor for defendant: *Clement.*

(<sup>1</sup>) Leave to appeal was refused.

[4 Common Pleas Division, 13.]

Nov. 15, 1878.

## WHITEMAN V. HAWKINS.

*Solicitor, Action against, for Negligence—Measure of Damages—County Court Appeal—Entering Judgment on Appeal by Motion—13 & 14 Vict. c. 61, s. 14—38 & 39 Vict. c. 50, s. 6.*

The plaintiff, who held a mortgage for £4,600 upon lands belonging to one F., agreed to make him a further advance of £400 upon having an additional piece of land, which F. had subsequently acquired, added to the former security. The defendant, who acted as the plaintiff's solicitor in the transaction, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of £46 upon this additional piece of land; in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying the £46:

*Held*, that this was negligence for which the defendant was liable; and that, in the absence of evidence to reduce the amount, the £46 so paid was the proper measure of damages.

APPEAL, by way of motion, from a decision of the judge of the county court of Northamptonshire holden at Thrapstone.

\*The facts appear more clearly by the following [14 written judgment than by the notes taken by the learned judge at the trial.

The plaintiff sought in this case to make the defendant personally liable for negligence as his solicitor, on the following grounds, viz., that when, in the year 1876, he the plaintiff was applied to for a further sum of £400 in addition to £1,600 then owing to him, with interest, by W. Foscutt on mortgage, he objected to make the further advance, as not being satisfied with the then existing security, and only agreed to do so on having a little piece of land, which had been bought by Foscutt of the devisees of one Parker, added to his security, and that he would not have advanced the further £400 if he had been aware of a prior incumbrance on that land, of which he was kept in ignorance through the defendant's having omitted to obtain delivery of the title deeds when Foscutt executed the new security.

These grounds, except as to the omission by the defendant to have the title deeds delivered up, and the plaintiff's ignorance of the prior incumbrances, were not supported by the evidence. On the contrary, the plaintiff's letters showed that he thought the security ample for the further advance without the addition of the little piece of land referred to (2 roods 8 perches), and that such addition was made at his own suggestion only on the ground apparently that it was not included in his former mortgages, and he might as well have all that Foscutt could give him. In a letter of the 27th of July, 1875, to the defendant, he (the plaintiff) says: "I went over Mr. Foscutt's estate yesterday, and feel satisfied that the security is ample at the present. I am willing to advance him about £300 more, to make the mortgage amount to £5,000. My advice was to him, Have sufficient to set you straight and pay your interest regularly as it comes due. Will you kindly inform me the outgoings upon it,—whether tithe-free. He says his sister has a charge of £300; that he states to be all. It would be much to his advantage either to let or sell his estate. I expect it consists of about 100 acres. Just state if that is correct. Is the little piece he bought of Parker included in the mortgage? If not, I think it should be." To this the defendant replied on the 2d of August, 1875, so far as is material, as follows:

"The amount of your mortgage at present is £4,600, and so £400 (not £300) is required to make up the £5,000. Mr. Foscutt, however, has only asked for £300, which he wants this week. The land is about 100 acres in extent. The land in Ringstead (about 74 acres) is subject to tithe rent charge, about £24 a year. The little piece Foscutt bought of Parker's devisees shall be included. I am not aware of any other outgoings; but I think there must be some Nene drainage tax. But I will get particulars from Foscutt."

Under these circumstances £400 was advanced by the plaintiff to Foscutt on the 9th of August, 1875, and was secured by a mortgage of that date from Foscutt to the plaintiff, prepared by the defendant, acting for both parties; and he witnessed Foscutt's execution of the deed, which included the little piece of land bought of Parker's devisees.

In the following year the plaintiff instructed the defendant to call in the mortgage and sell under the powers for that purpose contained in the mortgage deeds; and on the 10th of October, 1876, portions of the property (including the little piece of land bought of Parker's devisees, and mortgaged by the deed of 9th August, 1875) were sold for sums amounting to £1,142 2s. 2d. Other parts [5] were sold in the year 1877 for £1,590; and the remainder is still unsold, having been bought in for £2,800.

On the occasion of the sales in October, 1876, it was discovered that one French had a charge, under a deposit of the title deeds, on the little piece of land bought of Parker's devisees comprised in the mortgage of August, 1875, to the amount of £40, which the plaintiff was obliged to pay in order to get possession of the deeds relating to that piece of land. This sum, with £3 2s. for interest from the 13th of March, 1877, the date of the payment to French, amounting in all to £49 2s., the plaintiff seeks to recover in this action from the defendant, by way of damages for his negligence in allowing the plaintiff to make the further advance of £400 in August, 1875, on a defective security to the extent of French's equitable mortgage, and in not requiring the delivery of the title deeds relating to the additional piece of land from Foscutt prior to such advance, which enabled him to conceal the charge to French.

Under the circumstances, I am of opinion that this is not such a case of *gross negligence* as would justify me in holding the defendant liable to this claim. The letter of the 27th of July, 1875, was calculated to lead the defendant to suppose that the additional security of the little piece of land therein suggested was of trifling importance, the security otherwise being, according to the plaintiff's statement, ample, and, further, to suppose that the plaintiff had himself ascertained that the only charge on the mortgaged property was the sister's £300, and that the little piece bought of Parker's devisees, and proposed incidentally in that letter to be included, was free from incumbrances, as Foscutt afterwards in the deed of August, 1875, covenanted that it was: It is to be observed that, the then existing mortgage of £4,600 comprised sums advanced on ten different occasions by the plaintiff to Foscutt during a period of thirty-five years from April, 1840, the first advance being on the 24th of April, 1840, and that the plaintiff must have had repeated communications with Foscutt on the subject of those advances and the security for them; and that he was well acquainted with the property is shown by his suggestion as to the land bought of Parker's devisees. No previous complaint had ever been made against the defendant, who acted in these several transactions.

No explanation, on the other hand, was given of how the defendant came not to require delivery of the title deeds of the land bought of Parker's devisees, or why, when he ascertained at the plaintiff's request the outgoings on the land, he did not in the particulars he promised in his letter of the 2d of August, 1875, to get from Foscutt as to the outgoings, include inquiries as to any incumbrance or charge on the land bought of Parker's devisees. It was, however, stated on the part of the plaintiff that there was no wish to impute to the defendant any knowledge of French's charge, or any wilful intention to mislead the plaintiff into advancing his money on a defective security, but only negligence in the conduct of the mortgage of the 9th August, 1875.

Supposing I should be justified, as I think I am, in holding that not to be

gross negligence for which a solicitor may be personally liable to his client, the question of damages in this case still would raise a very serious difficulty. Foscutt, it appears, cannot be sued to any useful purpose on his covenant, though the evidence as to this was not conclusive, there being only evidence of an action against him for the whole mortgage debt, principal and interest, being abandoned \*as useless: but that would not prove it to be useless to sue [16 him only for the amount claimed of the defendant.

Independently, however, of this, there was no evidence of the piece of land bought of Parker's devisees, and mortgaged by the deed of 9th August, 1875, having been sold at a loss, at less than £90, the price stated to have been paid for it by Foscutt to Parker's devisees, or the £46 paid to French, or at less than its real value; no evidence, in fact, of the security of the 9th August, 1875, being an insufficient security to the extent of that piece of land notwithstanding French's charge. There was no evidence of how much of the £1,142 2s. 2d. realized by the sales in October, 1876, was the price of this particular piece of land. It may have been sold for more than the £46, for more even than £90 and the additional £46, for £140, or some sum near to that.

An account was put in, showing a deficiency of £344 12s. to meet the whole debt, principal and interest; but it was not shown how much of this deficiency was attributable, if any at all, to the piece of land in question; and the whole of this deficiency rests on the supposition that the remainder of the property not yet realized is worth only £2,800. There was no further evidence of this than its being bought in for that amount, which is evidence rather of its being worth more; and the plaintiff had himself more than once stated the whole property was worth more than £5,000, and was ample security for that amount.

In *Chapman v. Chapman* (1), a suit instituted by a client against his solicitor for negligence, it being uncertain whether the plaintiff would sustain any loss, Vice-Chancellor Stuart, in deciding against him, said there was no precedent, so far as he knew, of a decree declaring generally that the plaintiff in such a case should be indemnified in respect of an apprehended loss, which might never occur. This principle was acted on by Vice-Chancellor Hall in the late case of *British Mutual Investment Company v. Cobbold* (2), also a case against a solicitor for negligence in investigating a title, where, it being impossible then to say what loss (if any) the plaintiff company would sustain, the Vice-Chancellor allowed a demurrer to the bill, and said they must take their case to a court of law. But I apprehend no specific damages can be recovered at law, in respect of only an apprehended loss, which may never occur; although it has been held that such an action is maintainable, though the damages be only nominal. This is not such an action. Special damages are asked in respect of a loss which is not proved to have occurred, and which may never occur. I know of no precedent for the recovery of damages in such a case; and my judgment must be for the defendant; but, as I think he was, in the absence of any sufficient explanation, wanting in due care in not requiring the title deeds of the additional land comprised in the mortgage of August, 1875, to be delivered to the plaintiff, and the prior incumbrance to be paid off, I give no costs.

This judgment was pronounced on the 20th of March, 1878; and on the 8th of April, the following order was made by Field, J., at chambers, upon the application of the plaintiff, and upon reading the judge's notes: "I do order that the defendant do at the next sitting of the Divisional Court, for hearing appeals from inferior \*courts, [17 show cause why the judgment for the defendant in this action should not be set aside, and the judgment entered for

(1) Law Rep., 9 Eq., 276.

(2) Law Rep., 19 Eq., 627; 13 Eng. R., 556.

the plaintiff for the amount claimed, or a new trial granted, on the grounds,—first, that the judge of the court was wrong in holding that, although the defendant was wanting in due care while acting as solicitor for the plaintiff, in not requiring the title deeds of the additional piece of land mentioned in the particulars of claim to be delivered to him and the prior incumbrance to be paid off, yet the defendant was not liable to an action for negligence,—secondly, that, even if negligence were proved against the defendant, the plaintiff was not entitled to recover any damages from the defendant.”

Nov. 15. *Channell* showed cause: He contended that, upon the facts found, the judgment was perfectly correct, relying mainly upon the plaintiff's letter of the 27th of July, which, upon the authority of *Waine v. Kempster* (<sup>1</sup>), he submitted, absolved the defendant from making minute inquiries as to the sufficiency of the title. It was further contended that, until the whole of the securities had been realized, it was uncertain whether or not the plaintiff would sustain any loss, and consequently that he could only be at the most entitled to nominal damages.

*Hensman*, in support of the rule: *Godefroy v. Jay* (<sup>2</sup>) is an authority to show that, where an attorney has been guilty of negligence as such, he is liable in damages to the extent of the injury sustained by his client; and that, if he relies upon the absence of actual damage, it is incumbent upon him to prove it. Here, the defendant was admittedly guilty of negligence in not possessing himself of the title deeds of the piece of land bought of the devisees of Parker; and the plaintiff sustained damage to the extent of the £46 paid to French in order to get possession of those title deeds. The defendant offered no evidence: and for that sum the plaintiff is entitled to judgment.

[DENMAN, J.: Have we power to enter judgment upon a motion in this form?]

[*Channell*: In the case of an appeal under 13 & 14 Vict. c. 61, \*s. 14, the court has such power; but not under 38 & 39 Vict. c. 50, s. 6, under which this order was obtained.]

Sect. 6 of 38 & 39 Vict. c. 50 merely gives a new mode of appealing from the decision of the county court. The Court of Appeal is still to do full justice between the parties, as in the case of an appeal under s. 14 of the former act. Their power is in no degree abridged.

(<sup>1</sup>) 1 F. & F., 695.

(<sup>2</sup>) 7 Bing., 413.



DENMAN, J.: I am of opinion that Mr. Hensman has established his right to have the verdict entered for him for £46. The case is \*one of a very peculiar character. I [19 do not think it necessary, after the very elaborate judgment delivered by the county court judge, to go into the details. If his judgment turned upon any supposed distinction between different degrees of negligence,—if he thought that, to render the defendant liable to substantial damages, it was necessary to establish gross negligence as contradistinguished from a want of due care and attention to his business as a solicitor,—I think he was wrong. He appears to have come to the conclusion that the plaintiff could at the most be entitled to nominal damages. I cannot help thinking he did so upon the erroneous supposition that he could not give him more, on the ground that it was uncertain what damage the plaintiff had actually sustained. There appears to me to be no foundation for that. I think we have abundant materials before us to show to what extent the plaintiff has been damaged by the admitted negligence of the defendant. The whole case was fully gone into, and the defendant offered no evidence to show that the plaintiff had really sustained no damage. I apprehend it to be a sound principle of law, as against a wrongdoer, that, if negligence is proved, in the absence of evidence on the part of the defendant to reduce the damages, the plaintiff is entitled to recover the full amount of the pecuniary loss he has sustained. In *Featherston v. Wilkinson* (1), the defendants by charterparty agreed with the plaintiff that their ship should at a specified time load 1,300 tons of coal in the Tyne, to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had in consequence, first, to hire other vessels at an advanced freight, and, secondly, to buy 1,300 tons of coal at an enhanced price. He was unable, according to the custom of the coal trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, the defendants admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in the price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre. It was held that the fact of the plaintiff having paid the advanced price was *prima facie* evidence \*of dam- [20 age to that extent, and entitled him, in the absence of evi-

(1) Law Rep., 8 Ex., 122; 4 Eng. R., 498.

1878

Whiteman v. Hawkins.

dence to the contrary, to recover. "The plaintiff," said Kelly, C.B., "made out a *prima facie* case of damage, to which the defendants attempted no reply." So I say here. The principle,—or at least one part of it,—is, that the wrongdoer cannot be permitted to measure the damages resulting from his own wrong. I do not say that there is no conceivable evidence which might have been given here to modify the measure of damages. But I entirely assent to the argument of Mr. Hensman that it was for the defendant to offer such evidence. He did not do so: and he must abide by the case as the evidence stood at the trial. The judge ought to have given judgment for the plaintiff for the £46, and I think we ought to do so now.

With respect to our power to order judgment to be entered upon this order, it seems to stand thus: Sect. 14 of 13 & 14 Vict. c. 61 gave the court that power in the case of appeals under that section. That provision is still unrepealed, and consequently the power still exists, notwithstanding the new mode of procedure introduced by s. 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50); and I think it right to exercise it in this case. There will therefore be judgment for the plaintiff, with costs.

LINDLEY, J.: I am of the same opinion. The plaintiff, being a mortgagee, and being asked to make a further advance, agreed to do so, and instructed his solicitor (the defendant) to get an additional small piece of land, which the mortgagor had acquired since the first mortgage, included in the new security. It was manifestly the duty of the defendant to see that this piece of land was unincumbered, and to get the title deeds. In this he failed, and it turned out that this small piece was charged with an equitable mortgage to the extent of £46, and so became of less value to the plaintiff. The mortgaged property was subsequently sold in pursuance of the power contained in the mortgage deed; and, in order to effect that sale, the plaintiff was obliged to pay off the charge. Now, the defendant was clearly guilty of negligence of such a kind as to render him liable to an action. What, then, is the proper measure of damages? The plaintiff, having paid off the charge, is out 21] of pocket to the extent of £46. *Prima facie* \*that is the proper measure of damages. It has been suggested that the plaintiff is not to be treated as having lost that sum, because the whole of the securities for the mortgage have not been realized. But, what right has the defendant to throw the plaintiff on the unsold land more than on the mortgagor

personally? Upon the evidence as it stands, the plaintiff has been damnified to the extent of £46; and there was no proof to the contrary.

*Judgment accordingly* (").

Solicitor for plaintiff: *James Neal*, for Wallingford, Day & Wallingford, Huntingdon.

Solicitors for defendant: *Milne, Riddle & Mellor*.

(<sup>1</sup>) Leave to appeal was refused.

See 13 Eng. R., 559 note.

The register of the city of New York is liable for all errors, inaccuracies, or mistakes made in a return, when the usual requisition has been made at his office for a certificate of search.

It is the duty of the register to make the search correct, and any failure in that respect is a neglect of duty: *Van Schaick v. Sigel*, 60 How. Pr., 122, 11 N. Y. Weekly Dig., 117; *Houseman v. Girard*, etc., 81 Penn. St. R., 256; *Peabody*, etc., v. *Houseman*, 89 id., 261, 33 Am. R., 757, 760 note; *Rankin v. Hurck*, 4 Mo. App. R., 108.

As to pleading, see *Elder v. Bogardus*, *Lalor's Sup.*, 116.

And this, although the party, in making his requisition at the register's office, designated the clerk whom he desired should make the search: *Van Schaick v. Sigel*, 60 How. Pr., 122, affirming *S. C.*, 58 How., 211.

If a recorder keeps a general index, though not required to do so, and omits to index a deed in it, and thereby overlooks a deed regularly recorded and indorsed in the proper book, his certificate renders him liable: *Schell v. Stein*, 76 Penn. St. R., 398.

One who has notice of a defect in a search cannot recover of the clerk for such defect: *Brega v. Dickey*, 16 Grant's (U.C.) Chy., 494.

Where a clerk omits to properly docket a judgment, and in consequence of such omission a levy on sufficient personal property to satisfy an execution was defeated, the clerk is liable: *Governor v. Dodd*, 81 Ills., 162.

An attorney, clerk, or other person, who furnishes a search on the employment of A. is not liable to B., who makes a loan on the faith of the search, though there be a mistake therein.

There is no privity between the searcher and B.: *Savings Bank v.*

*Ward*, 100 U. S. R., 195; *Day v. Reynolds*, 23 Hun, 181, 11 N. Y. Weekly Dig., 196; *Com. v. Harmer*, 6 Phila. R., 90, 1 U. C. Local Courts Gaz., 108; *Chase v. Heaney*, 70 Ills., 268.

While a prothonotary is responsible for the accuracy of his search only to the person who employs him, yet, if the agent of the person who thus employs him, not relying upon the correctness of the certificate, applies to the prothonotary and he reaffirms its correctness, such reaffirmance is a republication of the certificate, and will bind the prothonotary and make him liable in damages for any injury resulting from a neglect to include a judgment in the search: *Scrivers v. Com.*, etc., 87 Penn. St. R., 15.

The lender may employ the borrower as his agent to procure a search: *Houseman v. Girard*, 81 Penn. St. R., 256.

Though one making a search is liable to his employer for damages from his negligence in making the search. He is, however, only liable for damages which are the direct consequence of his negligence.

If the employer lose the property from neglect to pay a judgment against himself, and not in consequence of the mistake, the searcher is not responsible for the loss: *Kimball v. Connolly*, 2 Abb. App. Dec., 504, 3 Keyes, 57, 33 How. Pr., 247.

See *Van Schaick v. Sigel*, 60 How. Pr., 122; *Chase v. Heaney*, 70 Ills., 268.

Where a deed contained a recital that it was made in consideration of a sum paid, and a further sum secured, and was upon record on the day it was made, and a mortgage was made at the same time by the grantee in the deed to secure the purchase-money, and was filed for record, but through the negli-

1878

Macdonald v. Carington.

gence of the clerk was not recorded, a subsequent mortgagee will be charged with notice of the existence of such incumbrance so as to bar his action against the clerk for a failure to put the mortgage on record: *Crews v. Taylor*, 14 Cent. L. J., 374, Sup. Ct., Texas.

It has been held that the sureties of a clerk are not liable for negligence by the clerk in making the search: *Com. v. Harmer*, 6 Phila. R., 90.

*Contra*: *Governor, etc., v. Dodd*, 81 Ills., 162.

The statute of limitations begins to run to an action for negligence in the making of a search, from the time when the search was delivered, and not from the development of the damages: *Owen v. Western, etc.*, 97 Penn. St. R., 47.

Or from the discovery of the error: *Rankin v. Hurck*, 4 Mo. App. R., 108.

An equitable suit will not lie against one for negligence in investigating title: *British, etc., v. Cobbold*, L. R., 19 Eq., 627, 13 Eng. R., 556, 559.

As to liability of an attorney for money lost on his investment, see *Mare v. Lewis*, Irish R., 4 Eq., 219.

An attorney who undertakes to have a mortgage recorded, is liable for damage in consequence of his not doing so: *Doan v. Warren*, 11 U. C. Com. Pl., 423.

Though an attorney is only liable for gross negligence in the management of a suit: *Chapman v. Boulton*, 13 U. C. Com. Pl., 372.

---

[4 Common Pleas Division, 28.]

Nov. 12, 1878.

28]

\*MACDONALD V. CARINGTON.

*Pleading—Claim in Plaintiff's own right—Counter-claims against him personally and as an Executor—Joinder of improper—Order XVII, Rule 5—Order XIX, Rule 3—Order XXII, Rule 9.*

A defendant must not set up by way of counter-claim against the claim of a plaintiff, suing only in a distinct personal character, claims against him personally and also as an executor.

MOTION on appeal from the decision of Field, J., at chambers, affirming the refusal by a master to strike out the counter-claim.

The claim alleged that: The plaintiff was the widow of 29] \*Godfrey William Wentworth Lord Macdonald, and the defendant was the widow of Robert John Lord Carington.

By an indenture of lease dated the 10th of May, 1856, and made between two trustees of the first part, the plaintiff of the second part, Lord Macdonald of the third part, and Lord Carington of the fourth part, certain hereditaments were leased by the trustees under a power given them by therein recited indentures of the 20th of August, 1845, and 20th of October, 1849, and 15th of January, 1854, with the consent of the plaintiff to Lord Carington, his executors, or assigns, for the term of twenty-one years from the 25th of March, 1856, at a yearly rent.

By the lease Lord Carington, for himself, his executors and assigns, covenanted with the trustees and the person or persons for the time being entitled to the premises thereby

demised in possession, that he Lord Carington, his executors or assigns, would, *inter alia*, repair the hereditaments.

5. By the indentures of 1845, 1849, and 1854, the hereditaments were settled to the use of the trustees during the joint lives of Lord Macdonald and the plaintiff, in trust to pay the rents and profits thereof, for the separate use of the plaintiff, and as to one moiety to the use of Lord Macdonald for his life, and as to the other moiety to the use of the plaintiff for life.

Lord Macdonald died on the 25th of July, 1863.

7. The plaintiff was the person for the time being entitled in possession to the premises demised by the indenture of the 10th of May, 1856, within the meaning of the covenants of the indenture.

Lord Carington entered and possessed the demised premises for the term, and afterwards died on the 17th of March, 1868, and his will was proved by the defendant, and all his estate and interest in the premises vested by assignment in the defendant, who entered into and became possessed thereof for the residue of the term.

9. The term had expired, and all conditions had been fulfilled by the plaintiff necessary to entitle her to the performance of the covenants in the lease, yet Lord Carington did not during his life, and since his death the defendant had not, repaired the premises.

\*The plaintiff claimed £5,500 damages for the [30 breaches of the covenants, as well from the defendant as executrix of Lord Carington as from her in respect of her own default.

The defence admitted the execution of the lease and denied paragraphs 5, 7, and 9.

The set-off and counter-claim alleged that: The plaintiff was sole executrix of the will of Lord Macdonald.

At the time of the lease of the 10th of May, 1856, the demised premises were in the possession of Lord Macdonald, but neither the plaintiff nor Lord Macdonald then had any right, title, or interest thereto, nor had they, nor either of them, ever had any title thereto, save such as thereafter appeared.

Prior to and at the date of his death in 1830, one George Thomas Wyndham was tenant for life of the demised premises, with remainder to his sons successively in tail male, with remainders to the daughters of one George Wyndham in tail as tenants in common.

In 1830 George Thomas Wyndham died intestate, leaving

an only son and two daughters. The son died at the age of eight years, in February, 1837.

On the death of the son all right, title, and interest in and to the premises vested in the daughters in tail as tenants in common, and remained so vested in them until their right was barred by the Statute of Limitations, as thereafter appeared.

Prior to and at the date of the lease of the 10th of May, 1856, Lord Macdonald was wrongfully and without right in possession of the premises, and negotiations had taken place between Lord Macdonald, the plaintiff, and Lord Carington, for the purchase by Lord Carington from the plaintiff or Lord Macdonald, of the fee simple of the demised premises. Owing to the matters before set forth, the plaintiff and Lord Macdonald were unable to make a good title to the premises.

It was thereupon agreed by and between Lord Carington and Lord Macdonald, with the sanction and agreement of the plaintiff that the premises should be demised to Lord Carington by the lease of the 10th of May, 1856, and that Lord Macdonald should further execute the deed next mentioned.

An indenture of the 10th of May, 1856, was executed by 31] and \*between Lord Macdonald and Lord Carington, which after reciting the lease bearing even date, contained the following covenants:

(a.) That if Lord Carington, his executors, administrators, or assigns, should during the term or within six months afterwards, be desirous of becoming the purchaser or purchasers of the hereditaments in fee simple at the price of £100,000, and should give to the person or persons for the time being entitled to the premises in possession subject to the term, notice thereof, then he, Lord Carington, his executors, administrators, or assigns, should be entitled to become the purchaser or purchasers of the same at that sum, and in case Lord Carington should pay the said sum then all necessary and proper parties would and should at any time after, on request, convey the inheritance in fee simple to him, or as he should direct.

(b.) That if Lord Carington, his executors, administrators, or assigns, should become the purchaser or purchasers, it should be assumed that George Thomas Wyndham, who was born several months after the death of George Wrighte (through whose will the said hereditaments were claimed), was not by construction of law or otherwise, living at the

decease of George Wrighte. And the title should commence with a settlement of 1767.

On the death of Lord Carington, his whole benefit in the covenants and the right to sue for breaches after mentioned, vested in the defendant either in her own right or as his executrix.

Lord Macdonald during his lifetime, or in the alternative, the plaintiff since his decease, had acquired a good title to the fee simple of the demised premises as against the real owners thereof by virtue of the statute 3 & 4 Wm. 4, c. 27.

The plaintiff was a person claiming and deriving title through Lord Macdonald, within the meaning of the said covenants.

Lord Carington before his death, and the defendant as executrix since his death, during the continuance of the term, and the defendant within six months after the expiration of the term were, and each of them was, desirous of becoming the purchaser of the demised premises.

All things had been done necessary to entitle Lord Carington in his lifetime, and the defendant since his decease, to the fulfilment of the covenants by the plaintiff.

\*Before any breach by the defendant, or Lord Car- [32  
ington, of their part of the agreement contained in the said indenture, the plaintiff wrongfully refused to be bound by the said covenants.

The necessary parties would not convey the fee simple.

The plaintiff did not, nor would she at the request and cost of the defendant, as such executrix as aforesaid, do or concur in such acts as were necessary on the plaintiff's part for effectually conveying the fee simple.

Between the date of the execution of the indenture containing the covenants and the breaches before set forth, Lord Carington and the defendant as executrix, had, with the knowledge of Lord Macdonald and of the plaintiff, intended to expend and had expended a large sum of money, upwards of £70,000, on the faith of the performance by the plaintiff of the said covenants.

At the time of the making of the indenture, Lord Carington had informed the plaintiff and Lord Macdonald of his desire and intention that such sum should be so expended, and the indenture was intended by the plaintiff, Lord Macdonald, and Lord Carington, to protect Lord Carington and his estate from losing the benefit of such expenditure.

The defendant had been unable to obtain a conveyance of the reversion, and had lost the benefits of the covenants and expenditure.

Even if the title of the plaintiff were not as therein before alleged, but as alleged in the statement of claim, the defendant was entitled to have the covenants performed, and the plaintiff had been guilty of the above breaches, and was liable to make good the above damages.

And the defendant in her own right, or in the alternative as executrix, claimed to set-off against the plaintiff's claim, if any, so much of the damages caused by the said breaches of covenant as might be equal thereto, and further counter-claimed against the plaintiff either as executrix of Lord Macdonald or otherwise, £80,000 damages and interest, and further relief.

*Mellor*, Q.C., and *R. Russell Griffiths*, for the plaintiff: The plaintiff sues in her own right of property. She is tenant for life, \*bringing an action for breaches of covenant in a lease: *Isherwood v. Oldknow* ('). But the counter-claim is against her as executrix of her late husband, for it is founded on breaches by him of a personal covenant in respect of which she would only be liable as executrix. Counter-claims are provided for by Order XIX, Rule 3, but they must be such as can be adjudicated upon together with the claim in one final judgment: see *Blake v. Appleyard* ('). Here the judgments might be quite of a different kind, such as for the plaintiff a certain sum, and for the defendant assets *in futuro*. If in the opinion of the court the counter-claims cannot be conveniently disposed of in the pending action, or ought not to be allowed, the court may refuse permission to the defendant to avail herself thereof. The defendant is attempting to raise a doubtful question of title, which may lead to long litigation, and "ought not to be disposed of by way of counter-claim, but in an independent action," and should therefore be excluded under Order XXII, Rule 9. By Order XVII, Rule 5: "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator."

[LINDLEY, J.: When is it that the "defendant sues" ?]

The words "sues" and "is sued" must be read with reference to the words "plaintiff" and "defendant," *reddendo singula singulis*. Assuming that the rule includes counter-claims, which is doubtful, it does not apply to the present case, but was intended to remove difficulties arising when an executor has been dealing with the assets, or making

(') 3 M. & S., 382.

(\*) 3 Ex. D., 195, at p. 197.



contracts in the course of the administration, and it becomes a question whether the contracts, being personally entered into by him, he should be sued in his character of legal personal representative, or in his personal character: see per Hall, V.C., *Padwick v. Scott* <sup>(1)</sup>. Although under the Judicature Act and Rules, nearly all causes of action may be joined, yet an executor cannot join any but those arising "with reference to the estate." In *Hodson v. Mochi* <sup>(2)</sup>, which will be cited for the \*defendant, the counter- [34] claims against the executors, who were plaintiffs, did not charge them personally.

*C. E. Bowen*, for the defendant: The counter-claim is in substance a claim against the plaintiff in her personal character, and was deemed to be so by Field, J., at chambers. The plaintiff may be tenant for life and entitled to the benefit of the covenants, or may be tenant in fee simple, but in either case the defendant has a right against her personally arising out of the expenditure on the land with her knowledge and on the faith of the performance of the covenants. She is also liable as executrix, and the defendant should not be restricted to one view of facts which the law may regard differently. The counter-claim is not vitiated simply because a double liability appears in it. The defendant may avail herself of the alternative. The plaintiff is allowed to join several causes of action and to sue the defendant as one liable both personally and as executrix, and the defendant has a reciprocal right of counter-claim. If the rules allow a third party to be brought into the dispute, the first litigant may surely be dealt with in a double character. It is desirable that both causes of counter-claim should be determined together, according to the spirit of the Judicature Act. By Order XIX, Rule 3, the defendant may set up by way of counter-claim "any right," as in a cross action. The court could "pronounce a final judgment" here, and the rule does not require that the judgment should necessarily be of the same kind, but only that it should settle the whole case. Suppose the two causes of counter-claim were debt and detainee, the judgment would necessarily be different in kind, but those causes could undoubtedly be joined and "final judgment" be given. There is no ground for saying that this "counter-claim cannot be conveniently disposed of in the pending action," within the terms of the above rule.

In *Hodson v. Mochi* <sup>(2)</sup> executors brought an action against a wife and her husband to charge her separate estate. The defendants counter-claimed money belonging to the wife not

(1) 2 Ch. D., 736, at p. 743.

(2) 8 Ch. D., 569; 25 Eng. R., 483.

part of her separate estate, and also for chattels in the possession of the testator, which were alleged to be the property of the husband, and the counter-claim was held good. 35] \*Order xvii, Rule 5, applies to counter-claims, as Hall, V.C., assumed in *Padwick v. Scott* (').

Any embarrassment resulting from the questions of law raised by the pleadings is common to both parties. The plaintiff can as easily reply to a counter-claim as plead to the claim in a cross action, which must be brought against her if the counter-claim is disallowed. But should the opinion of the court be now adverse to the defendant, the counter-claim shall be amended by striking out so much as charges the plaintiff in her executorial character.

*Mellor*, Q.C., replied: The equitable counter-claim against the plaintiff in her personal character, on the ground that she stood by while money was expended in improvements, is faint. The real claim is against her as executrix. A counter-claim is not coextensive with a claim; it is rather in the nature of a set-off allowed so that one final judgment may be given for a balance of debt or damages due from either plaintiff or defendant, as the case may be: see *Staples v. Young* (\*). The counter-claim, if amended, must be deemed to be a new one, to which the plaintiff may demur if necessary.

DENMAN, J.: My mind has fluctuated considerably during the argument. To put the case most favorably to the defendant we must read Order xix, Rule 3, before Order xvii, Rule 5, and when this is done it might at first sight be fairly contended that, inasmuch as Order xix, Rule 3, says a "set-off or counter-claim shall have the same effect as a statement of claim in a cross action," if Order xvii, Rule 5, immediately followed as part of the same set of enactments the provision in it, that "claims by or against an executor or administrator as such may be joined with claims by or against him personally," would include counter-claims as well as claims. But I do not think that such was the intention of these orders and rules. There might be good reason for enabling an executor or administrator, or a plaintiff, doubtful whether his claim should be made in his personal or representative character, to sue in the alternative without the result that, in case of counter-claims against an executor who is evidently suing in his own right, the defendant 36] should be entitled to set off any cause of action \*which he may have against the plaintiff in his two capacities. Stronger arguments or authorities than those adduced to-

(') 2 Ch. D., 736, at p. 743.

(\*) 2 Ex. D., 324.

day are needed to convince us that the word "claims" in Order xvii, Rule 5, includes counter-claims. The only trace of authority on the point is a passage cited as a dictum of Hall, V.C., who said in *Padwick v. Scott* (1) that, "assuming" the claim spoken of in Order xvii, Rule 5, can be considered to include a counter-claim, the meaning of the clause is as he afterwards proceeds to explain. But looking at the object and terms of the judgment, I think that the Vice-Chancellor merely assumed the case for the purposes of argument and not as a proposition to which he assented. In my opinion Order xvii, Rule 5, does not include the case of a counter-claim, and the defendant was not at liberty here to join a claim against the plaintiff as executrix with a claim against the plaintiff in her personal character, and I therefore think that, on that ground, the counter-claim inadmissible as it stands. I must also say that even supposing I am wrong, and that in certain cases it would be possible to join a counter-claim against the plaintiff personally with a counter-claim against him in an executorial capacity, we ought to jealously guard against its being done in such a way as to embarrass and inconvenience the fair trial of the action; and it appears to me that such joinder would be inconvenient and undesirable in the interests of the respective parties in this particular case. Independently of a question suggested by my Brother Lindley as to the existence or deficiency of assets, I think that a counter-claim drawn so as to be embarrassing ought not to stand in such form. I cannot see whether it is intended to set up a counter-claim against the plaintiff as executor or personally. That is an ambiguity on the face of the counter-claim itself. It appears that Field, J., refused to overrule the master's order because he thought it was a counter-claim against the plaintiff personally, and I think that is what will practically prove to be the case. Therefore, I think, our only alternative is to strike it out altogether, or to act on the power given in Order xxii, Rule 9, and order that the counter-claim may be excluded simply, or to make such order as to us shall seem just. We do not think it necessary to exclude the counter-claim simply by striking \*it out and leaving [37 the defendant to plead afresh, because it would be easy to strike out those parts which we think are embarrassing, and therefore our order is that this shall be done; and that the costs of the order shall abide the event of the action.

LINDLEY, J.: I am of the same opinion. It is unnecessary to strike out the counter-claim which may be easily

(1) 2 Ch. D., 736, at p. 743.

altered. But I do not think that it should stand as it is, for these reasons: this is an action by the plaintiff on a covenant to repair, to the benefit of which she says that she is entitled as tenant for life of the premises as her separate property. She does not claim as executrix in any way, but on the theory that she is entitled to sue in her own name and capacity. The defendant sets up in answer a case of a threefold description. She says, first, "I have a claim against you, the plaintiff, personally, on the ground that your predecessor in title entered into covenants running with the land which bind you giving me an option of purchase, and I claim damages from you for breach of that covenant against you yourself and not against you as executrix." That is a claim against the plaintiff in her individual character, and ought not to be struck out. Secondly, the defendant says: "I have a claim against you individually on the ground of certain expenditure on the land by me with your knowledge, you knowing of the option to buy," this claim also is against her in her personal capacity, and the defendant ought to be allowed to raise it. Thirdly, the defendant says: "I claim damages against you as representing the estate of the person who entered into a covenant for the option to purchase." That is so distinct that I think the claims ought not to be mixed up together, and it is inconvenient that they should be. I do not think that the provisions of the Judicature Act apply. The claim is by the plaintiff in her individual capacity, and the counter-claim is against her in both her individual capacity and her executorial capacity. In this view it is obvious that, assuming the latter cause of action lies, it is not directly or indirectly a defence to her claim. If she happened to be sole legatee, and there were no debts, it might possibly be a defence; but as it stands it is none, and, therefore, were it allowed, and she succeeded in the action, there would be a 38] judgment in her favor \*on her cause of action and, perhaps, a judgment against her in a totally different capacity, which would require to be worked out in a different way. The order authorizing counter-claims is Order XIX, Rule 3. It says that a defendant may set up "any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a *statement of claim in a cross action*, so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross claim.

Reading that without the context or other sections, or the light of authorities, I should understand that the defendant

in any action might set off, or set up by way of counter-claim, any claim against the plaintiff *in the same character in which he sues himself*, and the proviso to the section confirms that view. I see nothing in this particular case to bring it within the language of that order. Then Order xvii, Rule 5, is obviously inserted to prevent the difficulty where a plaintiff is suing on something which might give a cause of action in his executorial capacity as was pointed out in *Padwick v. Soott* (<sup>1</sup>).

If this were a case under Order xvii, Rule 5, it might possibly be that the case against the plaintiff as executrix is wholly distinct from that against her in her own capacity. It appears to me, therefore, that the defendant has failed to establish her counter-claim. Then what is to be done? We think the counter-claim should be amended by striking out so much as relates to the claim against the plaintiff as executrix.

*Counter-claim to be amended accordingly.*

Solicitor for plaintiff: *Whitehouse.*

Solicitors for defendant: *Freshfields & Williams.*

(<sup>1</sup>) 2 Ch. D., 736, at p. 743.

[4 Common Pleas Division, 39.]

Nov. 21, 1878.

\**Ex parte* ALICE COCKERELL.

[39

*Conveyance by Married Woman*—3 & 4 Wm. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1—*Setting aside Order on the Ground of Fraud or Suppression of Facts.*

Where an order under 3 & 4 Wm. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1, for the conveyance of a married woman's interest in property bequeathed to her has been obtained by fraud or the suppression of facts which ought to have been disclosed at the time,—the court will set it aside: but a clear case must be made out.

IN February, 1876, an order was made under 3 & 4 Wm. 4, c. 74; s. 91, and 20 & 21 Vict. c. 57, s. 1, to enable Mrs. Alice Cockerell to convey her interest in certain personal property to which she was entitled under the will of her late father, without the concurrence of her husband, upon the usual affidavit that he had deserted her, and contributed nothing towards her support, and that she did not know where he was.

*Crispe*,—the estate of the testator being now in course of distribution in the Chancery Division,—on behalf of the husband, by way of appeal from Lush, J., at chambers, moved to set aside the order, on the ground that the affida-

vit upon which it was obtained was untrue as to the allegation of the husband's desertion and of the wife's ignorance of his whereabouts, and also with regard to the value of the property. It was admitted that the order had been partially acted upon; and there was no suggestion of fraud.

*Lane*, contra, was not called upon.

LORD COLERIDGE, C.J.: These applications must be watched with care. If it can be shown that the order was obtained by fraud or by the suppression of information which it was essential that the court should have, the court will undoubtedly set aside the order. But nothing of the kind is suggested here. The application was supported by the affidavit of the wife, which even now seems to have been substantially true at the time. If any information had recently come to the knowledge of the person to be affected by the order, there might be some ground for this motion. The whereabouts of the wife, however, seems to have been well known to the husband; and no attempt has been made 40] \*to interfere with the order until the near approach of the time for the division of the fund. This application must be rejected with costs.

LINDLEY, J.: It should be understood that every order ex parte which is obtained by means of fraud or the suppression of facts will be set aside. But, when we come to look at the materials here, there appears to be nothing to show that the court was imposed upon when the order was made.

*Lane* asked that the interim injunction granted by Lush, J., to restrain the wife from further acting upon the order might be discharged, and that the costs (which had been reserved) should be paid by the applicant.

PER CURIAM: Let the injunction be dissolved, and all the costs be paid by the applicant.

*Order accordingly* (').

Solicitor for the applicant: *Albert Fleming*.

Solicitors for the wife: *Layton & Jaques*.

(') See *In re Rogers*, Law Rep., 1 C. P., 47.

See 26 Eng. Rep., 738 note; 27 id., 308 note.

The defendants having at the request of one Perry and the plaintiff, who acted as Perry's attorney, signed as sureties an undertaking given by Perry upon an appeal from a judgment entered against him, Perry, in order to secure the defendants against any liability thereon, confessed a judgment in

their favor, the plaintiff acting as their attorney in the taking thereof. Thereafter the plaintiff falsely stated to the defendants that, by signing the undertaking, they became liable to pay the amount due to him for services rendered to Perry in the action, and that for any amount so paid they were secured by the judgment confessed in their favor; and the defendants, relying upon

Twycross v. Grant

1878

the said statement, allowed the plaintiff to take a judgment against them in a justice's court for \$168.

In this action brought upon the said judgment, the defendants set up the foregoing facts as a defence.

Held, that the questions as to whether or not the said facts were sufficient to establish the defence of fraud, and whether or not the defendants had omitted to exercise reasonable prudence and caution in acting upon the plaintiff's statement and advice, should have been left to the jury, and that the court erred in refusing to allow the evidence thereof to be submitted to

them: *Greene v. Hallenbeck*, 24 Hun, 116.

A judgment obtained in violation of an agreement of compromise, by which an appearance to the action was prevented, is such a fraud as entitles the party against whom judgment is taken to have it vacated and set aside: *Nealis v. Dicks*, 72 Ind., 374.

See also *Harbers v. Terry*, 5 Bradw. (Ills.), 411.

Fraud vitiates a credit obtained by an administrator on an accounting: *Byerly v. Donlin*, 72 Mo., 270.

See also *Mulford v. Stratton*, 41 N. J. Law, 466.

[4 Common Pleas Division, 40.]

Nov. 11, 1878.

[IN THE COURT OF APPEAL.]

TWYCROSS V. GRANT and Others (').

*Practice*—"Interest" or "Cause of Action" surviving to the Personal Representative of the Plaintiff—*Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 38—*Rules of the Supreme Court*, 1875, Order 1, Rules 1 and 4.

An action was brought to recover from the promoters of a public company the price paid by the plaintiff for shares which had proved valueless, on the ground that the prospectus issued by them, in breach of s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), omitted to disclose certain contracts, which ought to have been specified therein. After judgment and pending an appeal to the House of Lords the plaintiff died:

Held, affirming the decision of the Common Pleas Division, that under Order 1, Rule 4, of the Rules of 1875, the plaintiff's interest in the action survived and was capable of "transmission" to his personal representative.

This action was brought by the plaintiff James Twycross against Grant and others, to recover back £700, the price of seventy \*shares in a joint stock company called The [41] Lisbon Steam Tramways Company, on the ground that he had been induced to buy the shares in question by the fraudulent suppression by the defendants, the promoters of the company, in the prospectus published by them, of certain contracts which ought to have been disclosed therein pursuant to s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131).

The action was tried before Lord Coleridge, C.J., at the London Sittings in Easter, 1876, when the jury found for the plaintiff upon certain questions submitted to them. The case came before the Common Pleas Division upon a motion

(') See 21 Eng. R., 387.

1878

Twycross v. Grant.

to enter judgment and also a rule for a new trial on the ground that the damages were excessive—see *Twycross v. Grant* (')—when that court gave judgment for the plaintiff, but ordered that £700 should be paid into court, pending an appeal. The Court of Appeal on the 2d of June, 1877, affirmed the decision of the Common Pleas Division. The defendants appealed to the House of Lords. Before the appeal came on for hearing, viz., on the 11th of February, 1878, the plaintiff died; and on the 5th of March letters of administration to his estate and effects were granted to his widow, Ellen Twycross, who was the sole legal personal representative of the plaintiff. On the 18th of May, it was ordered by a master, on the application of the administratrix, that she "be made a party to the action, and that she be at liberty to carry on and prosecute the same against the defendants." A summons was afterwards taken out, at the instance of the defendant Grant, to set aside the last-mentioned order, on the ground that the action did not survive to the administratrix. This summons was referred by the master to a judge at chambers, who referred it to the Common Pleas Division.

*Pollard* moved to set aside the order of the 18th of May, on the ground, that the cause of action was not one which survived to the personal representative. The power to make the order rests entirely upon Order L, Rules 1 and 42] 4 (\*). Under the Common \*Law Procedure Act, 1852, s. 137, the mode of continuing the proceedings, where a party to an action died, was by suggestion. The effect of the new rule is rather to narrow than to enlarge the old practice. The order can only be made where the cause of action survives. This is an action *ex delicto*: it is founded upon an alleged statutory fraud and therefore falls within the maxim, "*Actio personalis moritur cum personâ*." The statute *De Bonis asportatis*, 4 Edw. 3, c. 7, for the first time gave a remedy to executors for the recovery of goods and chattels

(\*) 2 C. P. D., 469; 21 Eng. R., 387.

(\*) Rule 1 provides that "an action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue." And rule 4 provides "where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it be-

comes necessary or desirable that any person not already a party to the action should be made a party thereto . . . an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties, may be obtained *ex parte* on application to the court or a judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence."



of their testators carried away in their lifetime. In 1 Williams on Executors, 7th ed., 793, it is said: "The statute of Edw. 3 does not extend to injuries done to the person or to the freehold of the testator. Therefore, an executor or administrator shall not have actions of assault or battery, false imprisonment, deceit, nor (unless by virtue of the statute 3 & 4 Wm. 4, c. 42, s. 2) for diverting a watercourse, obstructing lights, or other actions of the like kind, for such causes of action still die with the testator."

[FIELD, J.: The question here is, whether a cause of action arising out of the omission of a statutory duty followed by injury to the property of the intestate, passes to the administratrix.]

There is no duty or obligation cast upon these defendants by statute: but a mere penalty for non-performance of a requirement of the statute 30 & 31 Vict. c. 131: see *Peek v. Gurney* (\*). See also the case of *Davidson v. Tulloch* (\*).

[FIELD, J.: If Grant had died, and his estate had benefited by the fraud practised on the intestate, would not the cause of action have survived to the administratrix?]

That could not be denied. An administrator cannot have an \*action for a breach of promise of marriage to the [43 intestate, where no special damage is alleged: *Chamberlain v. Williamson* (\*). In *Knights v. Quarles* (\*), an administrator was held entitled to maintain an action against an attorney for negligence in permitting the intestate to take an estate with a bad title. But that was a case of breach of contract; and all the reasoning of the court in giving judgment is in favor of the present contention. *Bradshaw v. Lancashire and Yorkshire Ry. Co.* (\*) is to the same effect: but these are all cases of contract.

Then, assuming that this is a cause of action which would survive to an executor or executrix, it is not one which survives to an administratrix. The 4 Edw. 3, c. 7, gives the right of action to the executors. 25 Edw. 3, st. 5, c. 5, extends it to the executor of an executor. In the same reign passed the statute, which for the first time gave the ordinary power to grant letters of administration, viz., 31 Edw. 3, st. 1, c. 11. This being a statutory right, it can only enure to the class of persons to whom it is expressly given by the statute: and it is dependent on the privity created by the intestate himself. The claim in this case could not

(\*) Law Rep., 6 H. L., 377, 392, per Lord Chelmsford; 8 Eng. R., 1.

(\*) 3 Macq., 783.

(\*) 2 M. & S., 408.

(\*) 2 B. & B., 102.

(\*) Law Rep., 10 C. P., 189; 12 Eng. R., 310.

1878

Twycross v. Grant.

be made an item in the inventory under 21 Hen. 8, c. 5: see *Boone's Case* <sup>(1)</sup>.

*Sir H. James, Q.C., Morgan Howard, Q.C., and H. T. Atkinson*, showed cause: The cause of action here is, not a personal wrong done to the intestate, but a pecuniary loss or damage inflicted upon his estate by reason of the defendants' failure to perform a statutory obligation. It was a loss or damage in respect of which the administratrix herself might have sued. *Chamberlain v. Williamson* <sup>(2)</sup> is precisely in point. The rule is also laid down in 1 Wms. Saund., 245, and in 1 Wms. on Executors, 793, and also in Broom's Maxims, 5th ed., 906 *et seq.* An administrator is within the equity of the statute 4 Edw. 3, c. 7: *Smith v. Colgay* <sup>(3)</sup>. See also *Wilson v. Knubley* <sup>(4)</sup> and *Hodgson v. Sidney* <sup>(5)</sup>.

FIELD, J.: We are called upon to construe the 4th rule of Order L, of the Judicature Act, 1875. It is an entirely new \*provision, and one which is of an extremely beneficial character, and was intended to remedy the scandal and abuse of an action which has proceeded to almost its last stage, being rendered fruitless by reason of the death or bankruptcy of the suitor. I think the reason and principle of the matter are in favor of the order made by the master. I might take my stand upon the case of *Chamberlain v. Williamson* <sup>(2)</sup>, where Lord Ellenborough says <sup>(6)</sup>: "The general of law is, *actio personalis moritur cum personâ*; under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." I hold the provision in question to be of a remedial character, and to be one which ought to be construed liberally, to meet the evil aimed at. Is there, then, in this case any cause of action, any interest, which is capable of "transmission" to the administratrix? What was the interest of the intestate in the subject-matter of the action? It is described in the declaration thus,—The defendants were the promoters of a company registered under the Companies Acts, 1862 and 1867, and, before the issuing of the prospectus, had entered into certain contracts, and they issued the prospectus and invited the public to take shares in the company without disclosing the contracts therein; and the intestate, upon the

<sup>(1)</sup> Sir T. Raym., 470.

<sup>(2)</sup> 2 M. & S., 408.

<sup>(3)</sup> Cro. Eliz., 384.

<sup>(4)</sup> 7 East, 127, 134.

<sup>(5)</sup> Law Rep., 1 Ex., 313.

<sup>(6)</sup> At p. 415.

faith of the prospectus, and having no notice of the contracts, bought shares in the company and paid a large sum for them, which but for the concealment,—which by s. 38 of the Companies Act, 1867, is to be “deemed fraudulent,”—he would not have done; and the shares being worthless he lost his money. I cannot help thinking that that was an interest in the intestate, which was capable of transmission to his personal representative. There has been a death “causing a change or transmission of interest,” and it has “become desirable” that the administratrix should be made a party to the action. It has been contended by Mr. Pollard that rules 1 and 4 are to be read together, and therefore that, unless the cause of action “survives or continues,” the 4th rule does not come into operation. I come to the conclusion, however, that this case falls \*within the rule laid [45 down by Lord Ellenborough in *Chamberlain v. Williamson* (<sup>1</sup>), and consequently that the order of the 18th of May was rightly made, and this motion must be dismissed with costs.

HUDDLESTON, B., concurred.

*Motion dismissed.*

The defendant appealed.

Nov. 11. *Pollard*, for the defendant.

*Sir H. James, Q.C.*, and *H. T. Atkinson (Morgan Howard, Q.C.*, with them), were not called upon to argue.

BRAMWELL, L.J.: In my opinion this appeal must be dismissed. It is clear that at common law the rule as to torts was correctly expressed by the maxim, “*Actio personalis moritur cum personâ*.” This rule was greatly altered at an early stage of our legal history by 4 Edw. 3, c. 7, and this statute being remedial in its nature, and also those amending it, have been construed very liberally: they have been held to extend to all torts except those relating to the testator’s freehold, and those where the injury done is of a personal nature. And it has been held that an action will lie at the suit of an executor against a sheriff for a false return in the lifetime of the testator: *Williams v. Cary* (<sup>2</sup>); and also for an escape, *Berwick v. Andrews* (<sup>3</sup>); and the reason is that by these wrongs the value of the testator’s personal estate was diminished (<sup>4</sup>). This has been established for centuries, and the rule of law has been made still

(<sup>1</sup>) 2 M. & S. 408.

(<sup>2</sup>) 4 Mod., 403; 12 Mod., 71.

(<sup>3</sup>) 2 Ld. Raym., 971, at p. 973.

(<sup>4</sup>) See *Bradshaw v. Lancashire and*

*Yorkshire Ry. Co.* (Law Rep., 10 C. P., 189; 12 Eng. R., 310), commented upon in *Leggott v. Great Northern Ry. Co.* (1 Q. B. D., 599; 17 Eng. R., 238).

1878

Twycross v. Grant.

clearer by the Legislature, which by 3 & 4 Wm. 4, c. 42, s. 2, has given a more extended remedy to and against executors for wrongs committed during the lifetime of their testators; for it seems to have been assumed at the time of passing that statute, that an executor was entitled to maintain an action for any wrong whereby the personal estate had been injured. It has been contended that special damage to the estate ought to be pleaded, or at least shown, before an executor 46] \*can sue: I do not think so; it will be sufficient if, from the nature of the injury, it must diminish the personal assets. The counsel for the defendant has relied also on the judgment of Lord Chelmsford in *Peek v. Gurney* ('): amongst the questions argued before the House of Lords it had been contended that the executors of a deceased director of a company were liable for the injury occasioned by his misrepresentations as to its solvency. Lord Chelmsford held that they were not liable; but the ground of his decision appears to have been that the director's "estate derived no benefit from the misrepresentation to which he was a party," and no doubt was thrown upon the authorities showing that an executor may sue for a wrong committed to the personal estate of the testator during his lifetime; moreover, apart from 3 & 4 Wm. 4, c. 42, s. 2, a wide distinction exists between the liability of an executor to be sued and his right to sue. It was also suggested that the rights of an administrator stood upon a different footing from those of an executor; but this contention was not seriously persisted in. In 3 & 4 Wm. 4, c. 42, s. 2, executors and administrators are put upon the same ground with respect to the remedies created by that enactment: and this course would not have been adopted by the Legislature, if it had not been clear that at the time of passing the statute the rights of executors and administrators were the same. I am satisfied that the administratrix was rightly made a party to the action.

BRETT, L.J.: It seems to me clear that the cause of action survived to the administratrix, and that she was rightly substituted as plaintiff in the suit. Wherever a breach of contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shown upon the face of the proceedings that an injury has accrued to the personal estate. It seems to me that this circumstance need not be alleged in express terms in the pleadings, and that it is sufficient if the fact of injury appears by necessary implication. In the present case the declaration aver-

(') Law Rep., 6 H. L., 377, at pp. 392, 393; 8 Eng. R., 1.

red that the shares taken by the intestate were worthless, and that he lost the moneys paid for them (\*) ; this averment, as we must now take it, was proved, and therefore \*it plainly appears upon the face of the proceedings [47 that the personal estate of the intestate was diminished to the extent of £700, the amount of his loss as found by the jury. But, further, in my opinion it is not necessary that the injury to the personal estate should appear upon the pleadings ; it is sufficient, if it be shown at the time when application is made to add the executor or administrator as a party to the action.

COTTON, L.J.: I think that the order making the administratrix a party to the action was right. The question before us arises under Rules of the Supreme Court, Order L, Rule 4. The right of action survives to the administratrix, and she can sue for the tort committed during the lifetime of the intestate ; his personal estate has vested in her, and she can successfully claim compensation for any injury to it. In my opinion the injury to the personal estate is sufficiently averred in the declaration (\*). It has been argued that this is an action to recover damages : in one sense that is true ; but it is an action for a wrong done, not to the intestate himself, but to his property ; therefore the right to sue upon his death was transmitted to his personal representative. For the defendant, reliance has been placed upon the judgment of Lord Chelmsford in *Peek v. Gurney* (\*) : it is sufficient to say that in the opinion of his Lordship the executors of the deceased director were not liable, because his estate derived no benefit from the misrepresentation to which he was a party ; here the personal estate of the intestate was injured. The difference between the two cases seems to me very great.

*Appeal dismissed.*

Solicitors for administratrix : *Mercer & Mercer.*

Solicitor for defendant : *J. J. Ridley.*

(\*) 2 C. P. D., at pp. 471, 473 ; 21 Eng. R., 387.      (\*) 2 C. P. D., at pp. 471, 473 · 21 Eng. R., 387.

(\*) Law Rep., 6 H. L., 877, at pp. 392, 398 ; 8 Eng. R., 1.

See 29 Eng. R., 366 note.      whose negligence the injury is caused :  
Actions for personal injuries do not survive the death of the party through      *Stanley v. Vogel*, 9 Mo. App. R., 98.

1878

Hunt v. Wimbledon Local Board.

[4 Common Pleas Division, 48.]

Nov. 12, 1878.

[IN THE COURT OF APPEAL.]

## 48] \*HUNT V. THE WIMBLEDON LOCAL BOARD (').

*Corporations—Contracts under Seal—Local Boards, Contracts by—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 173, 174.*

By s. 174 of 38 & 39 Vict. c. 55, every contract made by an urban authority whereby the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority.

The defendants, an urban authority, verbally directed their surveyor to employ the plaintiff to prepare plans for offices. The plans were prepared by the plaintiff, and the defendants advertised for tenders for building the offices in accordance therewith, but when these were sent in, it was found that the plaintiff's plans were upon too expensive a scale, and the intended offices were not erected. There was no ratification under seal of the act of the plaintiff's surveyor in procuring the plans. At the trial the jury found that offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the erection of the buildings for which they were designed, and that the cost of the plans was £94 :

*Held*, that, assuming the contract was founded on an executed consideration, the plaintiff could not recover, for s. 174 was imperative, and not directory, and applied to every contract for a sum exceeding £50 entered into by an urban authority.

*Seemle*, that, as the plaintiff's plans did not enable the defendants to erect the offices required by them, they had not derived such a benefit as would entitle the plaintiff to sue upon an executed consideration.

APPEAL from the judgment of Lindley, J., in favor of the defendants.

Action for work and labor done and money paid by the plaintiff for the defendants.

The facts proved at the trial before Lindley, J., were as follows: The surveyor of the defendants, acting under verbal instructions from them, in May, 1875, employed the plaintiff, an architect, to prepare plans and drawings for offices which they proposed to erect. The plans were not finished until after the 11th of August, 1875 ('), and were 49] then approved of by the defendants, \*and advertisements were then issued for tenders for the buildings. Tenders were received, but none were accepted, the plans furnished by the plaintiff being of too expensive a character.

(') Affirming, *ante*, p. 106.

(²) The act that was in force when the plans were ordered was the Public Health Act, 1848 (11 & 12 Vict. c. 63), but before the plans were finished, this act was repealed and replaced by the Public Health Act, 1875, which came into operation on the 11th of August, 1875. Sect. 85 of the earlier act is substantially re-enacted by ss. 173 and 174 of the later act, but

as there was no material difference between s. 85 of the act of 1848 and ss. 173 and 174 of the act of 1875, except that £50 is substituted for £10 as the limit for contracts which do not require any particular formalities, the arguments and judgment of the Court of Appeal proceeded on ss. 173 and 174 of the act of 1875.

The jury found that the surveyor was authorized by the board to employ the plaintiff to prepare the plans, and that his act was subsequently ratified by them; that the offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the buildings for which they were designed. They found the cost of the plans to be £94. The learned judge directed that the judgment be entered in favor of the defendants<sup>(1)</sup>.

*Patchett, Q.C.*, and *E. Clarke*, for the plaintiff: Section 174<sup>(2)</sup> of the act of 1875 is merely directory; it contains no words annulling contracts not made in compliance with its provisions. The defendants are therefore bound by the contract, although it is not under seal: *Nowell v. Mayor of Worcester*<sup>(3)</sup>, *Frend v. Dennett*<sup>(4)</sup>. The contract is a contract of employment, and does not come within s. 174 so as to require that it shall be in writing and under seal. By s. 173 the defendants may enter into contracts necessary for the execution of this act, and by s. 197 they may provide such offices as may be necessary. The jury have found

<sup>(1)</sup> See 3 C. P. D., 208.

<sup>(2)</sup> By s. 4 of 38 & 39 Vict. c. 55, "local authority" means urban sanitary authority and rural sanitary authority. By s. 6, the local board is constituted an urban authority. By s. 7, every local board being an urban authority is made a corporation.

By s. 173: "Any local authority may enter into any contract necessary for carrying this act into execution."

By s. 174: "With respect to contracts made by an urban authority under this act the following regulations shall be observed:

"(1.) Every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority.

"(2.) Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract is not duly performed.

"(3.) Before contracting for the execution of any works under the provisions of the act, an urban authority shall obtain from their surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial

manner as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work or for executing and also maintaining the same in repair during a term of years, or otherwise.

"(4.) Before any contract of the value or amount of £100 or upwards is entered into by an urban authority, ten days' public notice at the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same.

"(5.) Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the parties thereto shall be binding on the authority by whom the same is executed, and their successors and all other parties thereto, and their executors, administrators, successors, and assigns, to all intents and purposes."

By s. 197: "Every urban authority shall from time to time provide and maintain such offices as may be necessary for transacting their business, or that of their officers and servants under this act."

<sup>(3)</sup> 9 Ex., 457.

<sup>(4)</sup> 4 C. B. (N.S.), 576; 27 L. J. (C.P.), 314.

1878

Hunt v. Wimbledon Local Board.

that the new offices were necessary; the defendants are therefore liable by force of s. 173, for the contract is not within s. 174. Moreover, even at common law the plaintiff can recover. It is true that the defendants are a corporation, but the consideration is not executory but executed. The defendants have had the benefit of it; they are therefore bound to pay for what they have had, on the principle of law laid down in *Nicholson v. Bradford Union* (1); *Clarke v. Cuckfield Union* (2); *Haigh v. Brierly Union* (3). Further, the plaintiff is entitled to recover by analogy to the doctrine in equity that, where there has been an entering into possession of land purchased under a verbal contract, the entering into possession is such a part performance as will take the contract out of the statute of frauds, and make it binding upon the vendor: *Ungley v. Ungley* (4); *Wilson v. West Hartlepool Ry. Co.* (5). Thus, the plaintiff having performed his part of the contract, it becomes binding on the defendants, who are liable under it.

[BRAMWELL, L.J., intimated that the court were of opinion that s. 174 is not directory but mandatory, and directed the counsel for the defendants to confine their arguments to the 51] \*question whether the contract having been executed the plaintiff could recover.]

*Marriott, Q.C.*, and *W. Paterson*, for the defendants: At the common law all corporations were permitted to contract as to certain small things without the formality of the contract being in writing or under seal. Then the decisions show that there was a conflict of authority as to what contracts should be in writing and under seal, and as to what contracts this formality might be dispensed with. With regard to contracts made by local boards, the Legislature by s. 85 of the Public Health Act, 1848, provided that all contracts exceeding £10 in amount should be under seal; and by the later act of 1875, which repealed the act of 1848, s. 174, enacted that all contracts made by an urban authority exceeding in amount £50 should be in writing and under seal. This is a general enactment, passed to get rid of the question what are contracts for small amounts, and by it all contracts whether executory or executed made by an urban authority must be made with the formalities prescribed by the section. This is a reasonable provision, for the urban authority are merely trustees for the ratepayers, and it is only just that the ratepayers should not be called upon to

(1) Law Rep., 1 Q. B., 620.

(2) 21 L. J. (Q.B.), 349.

(3) E. B. & E., 873; 28 L. J. (Q.B.), 62.

(4) 5 Ch. D., 887; 22 Eng. R., 535.

(5) 2 D. J. & S., 475.



contribute their money in large amounts towards the rates, unless the contracts made by the urban authority were reduced to writing and made with all due formality, such as fixing the common seal. In this case the contract is not in writing and not under seal, and the plaintiff cannot recover.

*Patchett, Q.C.*, was heard in reply.

BRAMWELL, J.: I am of opinion that the judgment of Lindley, J., was right, and ought to be affirmed. First, I think that s. 174 is applicable to cases other than those alluded to in it, and that it is not limited to them. The section is general, and refers to every class of contract, and there is no reason for limiting it. In the next place, I think the section is not merely directory but obligatory. It is not prohibitory so as to constitute the making of a contract, otherwise than in writing and under seal, an offence, but it is a mandatory direction that contracts shall be made in a particular way, that is to say, in writing and under seal. The enactment relates to a contract which is the act of both parties, \*and is applicable not to one of them alone, [52 but to both of them. I do not mean to say that the section makes anything particularly necessary upon the part of the contractee, but it requires that the evidence of the obligation of the two parties must be in writing and sealed with their seals. In this particular case the section is of importance, as drawing a line between cases where the contract shall or shall not be under seal. If it rested at the common law there might be a discretionary power as to what contracts should be entered into by parol and what contracts should be made under seal, such as contracts of small amount or acts of daily necessity, and some others which are said to be within the exception to the general rule that a corporation must contract under their corporate seal. If it were not for s. 174 it might be contended that contracts to the amount of £5 or £20, or even £100, came within the rule. The Legislature, however, have drawn the line and said that all contracts over £50 must be entered into under seal, and contracts for a less amount may be made by parol. That being my opinion as to the effect of the statute, I think it clear that this is a contract, upon which, if after the order had been given it had been countermanded by the defendants, and the defendants had said to the plaintiff, "Do not go on with it, we shall not employ you," no action could have been maintained. Then it is said that this is not an executory contract, but an executed contract, of which the defendants have got the benefit, and for which they must pay. I will deal with that question presently. First, reliance is placed on the doctrine

in equity as to contracts relating to land. It is said that a part performance, by entering into possession of the land under a verbal contract for its purchase, is sufficient to take it out of the Statute of Frauds. I think that that doctrine has no analogy to the present case, and the ground on which that law rests has been clearly stated by the Master of the Rolls in *Ungley v. Ungley* (<sup>1</sup>). He says: "The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the court to admit evidence 53] of the \*terms of the contract, in order that justice may be done between the parties." That reason is not applicable to a case like the present. But it is said the plaintiff is entitled to recover at common law, because the defendants have had what is called the benefit of the contract; the plaintiff has done the work and the defendants have had the enjoyment of what he has done. That rule, I believe, exists to some extent, though I am not sure that it would be found to exist where the price of the executed contract was of a large amount, if, for instance, a railway were built for a company at the cost of some hundred thousand pounds. I should not like to say it is decided by the authorities that in such a case the contractor who had made the railway could recover the price, the incorporated company who employed him having given him only a verbal order. However, this doctrine exists to some extent or to some amount: that where a man has done work for a corporation under a contract not under seal, and the corporation have had the benefit of it, the person who has done the work may recover. But whether that is limited to contracts for small amounts or not, I repeat, I will not say. It is, however, certainly limited to cases where the benefit has been actually enjoyed, and, as far as I know, to cases in which it could be said that the work is such as was necessary; that it was work which if the corporation had not ordered, they would not have done their duty; or if they had not given the order for its execution, they would not have been able to carry out the purposes for which they were called into existence. That seems to have been the state of things in those cases which have decided that the plaintiff may recover when the work has been done. I think, however, that that rule of law does not apply to the present case for two reasons. The defend-

(<sup>1</sup>) 5 Ch. D., 887; 22 Eng. R., 535.

ants have not had the benefit of the work in that sense. No doubt the order for the work was given. After the finding of the jury, it must be taken that the surveyor was authorized by the board to employ the plaintiff to prepare the plans, and that his act was ratified by the defendants, and that the work was done pursuant to an order (or something equivalent to an order) which was given, and as far as that work went it was accepted in that sense by the defendants, who acted upon it, and issued advertisements in respect of it, and received tenders in relation to it. But that is all. Any \*further benefit that the defendants would have [54 derived from those plans, if the tenders had been accepted, would have been that their buildings should have been erected in accordance with those plans. What the defendants have done is this: they have to a certain extent taken to these plans and tried to use them—tried to apply them to the purpose for which they were wanted—but they found that the proposed plans were too expensive, and could not be used. I doubt, therefore, whether the defendants have had the benefit of the plans, in the sense in which it is plain the defendants had the benefit of the coals in *Nicholson v. Bradfield Union* (<sup>1</sup>), or of the water-closets in *Clarke v. Cuckfield Union* (<sup>2</sup>). In both those cases it would have been contrary to the duty of the defendants if they had not given orders for the things supplied. In the present case the defendants might have continued transacting their business—possibly not so comfortably or so advantageously—without new offices; they might have waited for them.

I will now call attention to the cases. In *Nicholson v. Bradfield Union* (<sup>1</sup>), Blackburn, J., entertained great doubt, but followed the decision in *Clarke v. Cuckfield Union* (<sup>2</sup>). The amount, it must be recollected, which it was sought to recover against the defendants was small, only £26 10s. I doubt, therefore, whether that case would not come within the rule that orders for things of small amount may be given by corporations, if they are used for matters of urgency or necessity, without the contract being under seal. The action was for coals sold and delivered, to which the defendants set up as their defence that the contract with the defendants, a corporation, was not under seal. Blackburn, J., in delivering judgment, speaks with hesitation, and says: "The case of *Clarke v. Cuckfield Union* (<sup>2</sup>), is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision, and, as pointed out in the judgment of that

(<sup>1</sup>) Law Rep., 1 Q. B., 620.

(<sup>2</sup>) 21 L. J. (Q.B.), 349.

1878

Hunt v. Wimbledon Local Board.

case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present, at least, the case was rightly decided; there may be cases in which the circumstances may be different from those in *Clarke v. Cuckfield Union* (1) and the present case, and 55] which would still be \*governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with the decision in *Clarke v. Cuckfield Union* (1), we prefer to follow the authority of *Clarke v. Cuckfield Union* (1), which we think is founded on justice and convenience." Again, in *Clarke v. Cuckfield Union* (1), I may point out that the contract was executed and the amount sued for small—it was only £14 16s. I would make a remark on the case of *Haigh v. Brierly Union* (2). I think that Erle, J., does not rest his decision on the ground merely that the work has been done, but he considered that the retainer of the plaintiff to investigate the accounts of the union and to do the work would have been a binding engagement. In *Nicholson v. Bradfield Union* (3), Blackburn, J., said, "that justice and convenience" require that where the contract was executed a defendant corporation should be held liable to pay for it. I am by no means clear that in such a case as this the defendants should be ordered to pay. I am by no means sure that persons who are exercising their authority daily should not exercise that authority in a proper manner; and I think it desirable that persons who make contracts with those who have an authority delegated to them should not act in a slovenly manner; and if they do not care to inquire what authority such persons possess they must take the consequences. I cannot but think that in the present case if there had been a little more solemnity in making the contract—if the contract had been reduced to writing, for instance—it is not improbable that the plaintiff's attention might have been called more particularly to the plans required, and he might have been told that if he prepared plans for the erection of expensive offices, they would not be such plans as the defendants required, as they could only lay out a certain sum of money on the buildings. Sects. 173 and 174 of the Public Health Act, 1875, were passed for the protection of rate-payers. I think they are good enactments, and we ought not to allow them to be frittered away.

(1) 21 L. J. (Q.B.), 349.

(2) E. B. &amp; E., 873; 28 L. J. (Q.B.), 62.

(3) Law Rep., 1 Q. B., 620.

BRETT, L.J.: I am of opinion that even if s. 173 of this statute had not been enacted, the plaintiff could not recover, on the \*ground that the defendants were a cor- [56] poration, and that this contract was not under seal.

The general rule is, that where the defendants are a corporation and the contract made with them is not under seal, the defendants are not liable. I think this case is within the general rule, and would not be within any of the recognized exceptions. It certainly is not within the exception which is mentioned—if it can be called an exception—or within that doctrine of the Court of Chancery which is applicable to the Statute of Frauds. That doctrine of equity with regard to the Statute of Frauds is equally applicable whether the defendant be a corporation, or whether the defendant be only an individual, and is founded upon the view that the Statute of Frauds only deals with a matter of evidence upon a suit or trial. In the case of the Statute of Frauds the original contract is perfectly valid, and the only effect of the statute is that in a contested suit no evidence can be given of that contract unless certain formalities have been observed. The Court of Chancery has held that in certain circumstances they will allow evidence to be given of the contract although the formalities of the statute have not been fulfilled. But that decision cannot have any reference or any application to a case where the contract originally, by a rule of law, is invalid. I think, also, that this case is not within any of the common law exceptions which have been suggested.

I think there is a common law exception, that although there be a corporation, with regard to which contracts in general must be under seal, yet if that corporation be of such a nature that daily, or periodically, or at frequent intervals, small transactions must take place, where it would be obviously of the highest inconvenience, or perhaps impossible, that each of such small contracts should be under seal, the common law courts have declared that there is an exception.

Upon this contract the plaintiff never could have had any claim until his plans were complete, and the making of plans is not a frequent occurrence, nor a necessary part of the defendants' business. For the performance of a small contract, therefore, this case is in no respect within the recognized exception. Another exception is suggested. It is said that there is a rule that where orders are given by or on behalf of a corporation, and those orders \*result [57] in an apparent contract, though not under seal, and the

party with whom that apparent contract is made has fulfilled the whole of his part of the contract, and the corporation on whose behalf such apparent contract has been made accept and enjoy the whole benefit of the performance of the contract, that then the corporation is liable, although the contract is not under seal.

I doubt very much whether there is any such rule, either in law or equity. But it is unnecessary to consider this point, because here, assuming the order to have been given on behalf of certain persons, who may be called *cestuis que trust*, this is not a case within the rule. It is not like the case of a corporation where directors may give an order and make an apparent contract, and those on whose behalf they give the order may either reject or accept it; as, for instance, if the directors of a railway company verbally order a railway to be constructed by a certain contractor, the whole corporation (namely, the shareholders, on whose behalf the directors had given the order) may, if they should please, reject the order; but if the railway is constructed, they may accept it by obtaining the benefit of what the contractor has done and receiving dividends in respect of the use of the railway. Where there is a body of shareholders capable of accepting the benefit of the contract, such a doctrine as is suggested may be applicable. But here the board is the corporation, who are acting for the inhabitants, who can neither accept nor reject what the board has done. The inhabitants cannot make use of what the board orders in the same way or in the same manner as the shareholders of a railway make use of a railway. Suppose the case of drains being made; no doubt the inhabitants use them, but they do so without the option of rejecting them. It seems to me, therefore, that in the case of such a corporation as this the doctrine suggested would not be applicable at all. But even if the local board were such a corporation that the parties on behalf of whom the order was given need not take the benefit of the work done, I think that in this case neither the board nor the inhabitants have derived any benefit. The work done by the plaintiff is drawing plans in order that certain buildings may be built. He drew the 58] \*plans and fulfilled the whole of what he undertook. But then the only real benefit of such work as the drawing of plans is that buildings should be built according to them. Now, I think it is clear that the board accepted the plans, and they made some use of them—that is, they used them so far that they allowed them to be inspected, that tenders might be made upon them. But that is not a beneficial user. It

is no benefit to a person to give out plans to be tendered for if no tenders are made upon them, or nothing is done upon such tenders as are made. Therefore I think that, though the plans were accepted and partially used, no one obtained any real benefit from them. Therefore, even if the doctrine suggested had a real existence, and if the board, and the board alone, were the persons to be benefited, which I think is not the case, even then the board has not had such a benefit from this work as would bring this case within the suggested exception to the general rule. Therefore, even independently of the statute, I am of opinion that the plaintiff cannot recover. But I am further of opinion that the statute in this case is conclusive; and it seems to me that the statute is clearly more than directory. It is what has been called mandatory. It prevents certain contracts from being valid in any way, and the real meaning of the section seems to be this. The Legislature, knowing of the exception which existed at the time the statute was passed with regard to small contracts of frequent occurrence, which are necessary for the carrying on of the business of the corporation, intended to get rid of any discussion as to what were small matters, and to say that contracts which the board would not otherwise be authorized to make might be made for amounts less than £50—that is to say, that if they were necessary and under £50, they should be brought within the recognized exception as to small matters; and that if they were over £50, the mere fact of their being over £50 would prevent their coming within the exception.

With regard to the cases that have been cited, I concur with Bramwell, L.J. The case of *Haigh v. Brierly Union* (\*) appeared to be most like the present, but it is not necessary to say whether we should have thought that the facts [59 of that case come within the exception. But I cannot help thinking on looking at the judgment of Crompton, J., that he acceded to the judgment in that case, whether rightly or wrongly, upon the assumption that the contract related to an act of frequent occurrence and for a small amount and therefore within a recognized exception. It signifies not whether we should agree that the facts brought it within the exception; the judgment did not assume to state any new law, but only to bring the facts of the case within the recognized rule.

I am of opinion that this judgment should be affirmed.

(\*) E. B. & E., 873; 28 L. J. (Q.B.), 62.

1878

Hunt v. Wimbledon Local Board.

COTTON, L.J.: I also am of opinion that the judgment of Lindley, J., was right. First, I shall deal with the question as if there had been nothing special in the act of Parliament as to the contract entered into by the local board in this case. The common law being that a corporation cannot bind itself by contract except under seal; there are certain exceptions to that rule. There is one exception, that for the purpose of carrying out the ordinary business for which the corporation has been formed, it has power to bind itself without a contract under seal. But that is only in small matters necessary for the ordinary business of the corporation. There are, however, reasons why that cannot apply to this case, so as to bring the matter within such an exception. But it is urged that there is another exception, namely, that corporations are liable when goods have been supplied or work done in pursuance of a contract entered into not under seal, and the corporation have had the full benefit of such contract. I entertain very grave doubts whether such a corporation as this could be bound on any such ground, because the parties who have a beneficial enjoyment of anything supplied on the order of this body are not the corporation, but those for whom the corporation act as trustees. I cannot see that the principle can apply to a corporation constituted as this is, existing not for its own benefit, or for doing that from which it can derive any benefit, but as trustees for a certain portion of the public. But even if such a corporation can be so bound, in my opinion [60] there has not been such \*a beneficial user of these plans as to bring the case under that exception. No doubt there has been a certain user, but a user which produces no benefit to the corporation, or to the inhabitants of the district, for in consequence of the plans not being suitable the matter went no further than the using of the plans for the purpose of obtaining tenders; and when the tenders came in, it was found that the plans could not be carried into execution, and therefore the plans were not used for what, in my opinion, is the most important part of the purpose for which they were made, viz., for the purpose of the erection of offices for the use of this corporation.

Then what is the effect of the statute? It was argued that such a contract as this did not come within s. 174, because that section only applied to contracts necessary to carry this act into execution, and that obtaining these plans and building new offices did not come within that description; but unless this is a work necessary for carrying the act into execution, I do not see how it is possible that the



corporation had power to enter into any contract with reference to the matter. Certainly, if they had offices, it must be for the purpose of carrying the act into execution, and any contract relating to those offices is a contract for the purpose of carrying the act into execution. Therefore s. 174, in my opinion, applies to this contract, and whatever may be the case as regards subs. 3 of that section, in my opinion, subs. 1, which relates to the manner in which the contract between the two is to be made, is mandatory, and prevents any contract for an amount exceeding £50 from being entered into under the act except under seal.

The act gives power to the corporation to provide funds for the purpose of carrying into execution the provisions of the act, that is so say, to levy rates. And in my opinion the meaning of the act is, that as regards contracts where the amount exceeds £50, the board shall not charge the rates which they have power to levy except by a contract under seal. Therefore I am of opinion, subject however to what I am about to say, as regards the equitable doctrine, that there can be no decree in this case for the plaintiff. But it was said that the case came within the equitable doctrine of part performance. For the purpose of [6] considering this question, I will deal with the cases of *Ungley v. Ungley* (\*) and *Wilson v. West Hartlepool Ry. Co.* (\*), which were principally relied on. We must bear in mind that this is a contract which in former days the Court of Chancery would not have enforced. *Ungley v. Ungley* (\*) was an instance of part performance taking the case out of the Statute of Frauds. There had been a contract entered into by a father at his daughter's marriage in relation to a house; and as there was no agreement in writing, the Statute of Frauds would have prevented any action being maintained to enforce the contract. But possession had been given to the parties who sought to recover, and therefore the Court of Equity said there was such part performance as enabled it to act on parol evidence of the contract. Courts of equity, in my opinion, acted on this principle. The Statute of Frauds says that in certain cases no action shall be maintained unless there is evidence in writing to show what the contract was. But if a court of equity finds an overt act, such as the possession of land, then the presumption of a contract is raised, and the court will, in consequence of that overt act, allow parol evidence to be given for the purpose of ascertaining what the actual contract was. These are the cases in which the courts of equity

(\*) 5 Ch. D. 887; 22 Eng. R., 535.

(\*) 2 D J &amp; S., 475.

1878

Hunt v. Wimbledon Local Board.

have given an effect to contracts valid at common law, which could be enforced but for the Statute of Frauds. That is the ground on which these cases rest, and that it is not on the ground of fraud is shown by this, that the payment of the price to a vendor will not take the case out of the statute. But surely it is as great an injustice for a man to receive the price and then say, "You cannot enforce the contract," as to repudiate the contract where possession has been given. When there is an overt act, a court of equity will receive parol evidence of the contract; but that is in cases of specific performance of contracts relating to land which are valid at common law.

The other case which was referred to was the case of *Wilson v. West Hartlepool Ry. Co.*<sup>(1)</sup>. There Turner, L.J., gave judgment, and Knight Bruce, L.J., did not concur. I need [62] scarcely say that \*the opinion of Turner, L.J., is one which I should hesitate to dissent from. But he to a great extent is in that case dealing with the difficulty of the Statute of Frauds. The powers of the defendants in that case were unlike those of the present defendants. They were a railway company governed by the provisions of the Companies Clauses Consolidation Act. That statute provides that contracts which if made by private individuals must be in writing will bind the company if signed by two directors; the statute says not that they must be so made, but that they may be, and Turner, L.J., is applying the principle of part performance of parol contracts relating to land made by individuals to the case where the defendant was a railway company, capable of being bound by the written contract of its directors, as an individual is capable of being bound by his own contract in writing.

There are other parts of the judgment of Turner, L.J., to which the explanation does not apply. He is there referring to an equity enforced by courts of equity independently of contract. It is this: if an individual who has to his knowledge title to land sees another (who is ignorant of such title and believes that he has a good title) expending money on the land, and yet gives no notice of his own title, a court of equity will not afterwards allow him to assert his title to the prejudice of the person whom he has allowed to act in ignorance of that title. This is an entirely different equity inapplicable to the present case.

*Judgment affirmed.*

Solicitor for plaintiff: *W. T. Foster.*

Solicitor for defendants: *W. H. Whitfield.*

<sup>(1)</sup> 2 D. J. & S., 475.

[4 Common Pleas Division, 68.]

Nov. 13, 1878.

[IN THE COURT OF APPEAL.]

**\*MEYERHOFF and Another v. FROEHLICH (').** [63]*Statute of Limitations—Promise to revive a Debt under 9 Geo. 4, c. 14, s. 1—Conditional Promise.*

In May, 1874, the defendant, in answer to a demand of a debt incurred by him, wrote to the plaintiffs as follows: "I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." In September, 1876, he again wrote: "Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living." At the trial the defendant admitted that in one year since 1874 his income was greater by £14 than it had been in that year; but no proof was adduced that the "general commercial crisis" alluded to in the defendant's letter of September, 1876, had given way:

*Held*, affirming the judgment of Denman, J., that if the defendant's letters constituted such acknowledgments as to warrant the inference of promises to pay, they were conditional promises only, and there was no proof of the substantial fulfilment of the conditions.

APPEAL by the plaintiffs from the judgment of Denman, J., in favor of the defendant. The facts of the case are fully stated in the report of the proceedings before that learned judge ('), and the following brief summary of them will be sufficient.

The defendant owed the plaintiffs a sum of money, and made payments on account of the principal and interest; the last payment was made on the 13th of January, 1870. In reply to an application from the plaintiffs for payment, the defendant, by a letter dated the 29th of May, 1874, wrote: "Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." In another letter, dated the 15th of September, 1876, the defendant wrote to the plaintiffs: "Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living." The defendant had an income of £200 a year arising from commissions, and in one year after 1874 his income was £214. No proof was adduced, that "the general commercial crisis" alluded to in the defendant's letter of the [64 15th of September, 1876, had given way.

Nov. 12, 13. *C. Crompton (C. Russell, Q.C., with him)*, for the plaintiffs, in support of the appeal: At the time

(') Affirming, *ante*, p. 200.

(') 3 C. P. D., 333.

1878

Meyerhoff v. Froehlich.

when the defendant wrote the letter of the 29th of May, 1874, the debt had not been barred by the Statute of Limitations; and therefore, as the plaintiffs might have immediately sued him, his letter ought not to be construed as containing a repudiation of liability; on the contrary, he admits the debt, *Collis v. Stack* (\*); *Sidwell v. Mason* (\*); *Lee v. Wilmot* (\*); *Chasemore v. Turner* (\*); and this is a sufficient acknowledgment to take the case out of the statute. The letter of the 15th of September, 1876, in truth contains an absolute acknowledgment: *Bird v. Gammon* (\*); *Cornforth v. Smithard* (\*). The facts of the present case do not fall within the principle of *Smith v. Thorne* (\*). It follows from the authorities that if before a debt is barred by the Statute of Limitations, the debtor, while acknowledging his liability, promises to pay only upon a condition, he must express that condition in clear terms; otherwise the acknowledgment will be construed to be absolute. Further, if the promise contained in the letter of the 29th of May, 1874, was conditional, the condition has been fulfilled; in one year the defendant's income has been larger by £14.

*C. H. Hopwood*, Q.C., for the defendant, was not heard.

BRAMWELL, L.J.: It is unnecessary to call upon the defendant's counsel to argue this case. This branch of the law does not stand upon a satisfactory footing, and affords scope for amendment by the Legislature. Apart from what is laid down in decided cases, I should be inclined to think that a debt is taken out of the statute by an acknowledgment, and that no express promise to pay it is necessary; but I cannot think that the debtor renders himself liable, if, while he [65] acknowledges that the debt formerly existed, \*he nevertheless claims the benefit of the Statute of Limitations. The language of 9 Geo. 4, c. 14, s. 1 (\*), is not very precise; but possibly "acknowledgment" refers to actions of debt, and "promise" to the former actions upon the case upon promises. But certainly the law is not clear. It has, however, been established by *Tanner v. Smart* (\*), and similar

(\*) 1 H. & N., 605; 26 L. J. (Ex.), 138.

(\*) 2 H. & N., 306; 26 L. J. (Ex.), 407.

(\*) Law Rep., 1 Ex., 364.

(\*) Law Rep., 10 Q. B., 500; 14 Eng. R., 304.

(\*) 3 Bing. (N.C.), 883.

(\*) 5 H. & N., 13; 29 L. J. (Ex.), 228.

(\*) 18 Q. B., 134; 21 L. J. (Q.B.), 199.

(\*) By 9 Geo. 4, c. 14, s. 1: "In actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed

sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments" (Statutes of Limitations, 21 Jac. 1, c. 16, and 10 Car. 1, s. 2, c. 6), "or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby."

(\*) 6 B. & C., 603.

cases, that a mere acknowledgment will be insufficient, if the debtor states either that he will not pay, or that he will pay only upon a condition which remains unfulfilled, or at a time which has not elapsed. Beyond establishing this principle, I do not think that much assistance is to be obtained from a perusal of the cases, for one carelessly written letter is not of much use in construing another. I cannot think that these letters take the debt out of the Statute of Limitations. It is true that the defendant acknowledged his liability; but it is plain also that he was contemplating something that might possibly thereafter happen, namely, the improvement in his pecuniary position, and that he did not intend to pay the debt until that improvement should have taken place; and I am of opinion that Denman, J., was right in holding that the evidence did not satisfy him, that at the time of issuing the writ the defendant was in a better position than he was when he wrote the letter dated the 29th of May, 1874. The plaintiffs' counsel also contended that the defendant's letter of the 15th of September, 1876, was sufficient to defeat the operation of the Statute of Limitations: the terms of that letter are too vague and indefinite to amount to a promise; and further, if any promise can be inferred, it is a promise to pay "as soon as the general commercial crisis gives way;" and there was no evidence that this has occurred; therefore the condition attached to the promise has not been fulfilled. This appeal must be dismissed.

\*BRETT, L.J.: Upon a reference to the decisions [66 which have taken place, the construction of 9 Geo. 4, c. 14, s. 1, becomes clear: in order to keep alive the liability of the debtor there must be a written acknowledgment or promise to pay; from a simple acknowledgment a promise to pay may be implied; but if there be an express promise, no promise can be implied from the acknowledgment. I do not think that much doubt can be felt as to what the law upon the subject really is; but sometimes doubts arise, owing to the varying language in which different persons express themselves. In the present case I think that the correspondence does not take the case out of the Statute of Limitations: it is true that in the letter dated the 29th of May, 1874, the defendant acknowledges the debt and he promises to pay it; but that promise is conditional upon his position becoming somewhat better. The defendant did not mean that he would pay the debt, if his income should become one shilling a year larger; and I think it almost equally clear that he intended to discharge his liability only when his

1878

Meyerhoff v. Froehlich.

means should be substantially increased, and that an addition of £14 in one year is not such a substantial increase as was intended by him. The facts do not contain any other evidence showing that his position became improved before action. From the letter of the 15th of September, 1876, no promise can be implied: it seems to me to be the letter of a man, who feels himself to be in a nearly hopeless condition. I fully agree with the judgment at which Denman, J., has arrived.

COTTON, L.J.: It seems to me that the judgment of Denman, J., was correct. The cases which have been decided upon 9 Geo. 4, c. 14, s. 1, have put a construction upon it, which we are bound to adopt; that construction is as follows: in order to prevent a debt from being barred by the Statute of Limitations, there must be a written acknowledgment or promise to pay; from a simple acknowledgment a promise may be implied; but if there be a conditional promise, the condition must be fulfilled. With respect to the correspondence before us, I may say that if there be an express promise there can be none by implication, and if the whole tenor be inconsistent with an unconditional admission, the inference necessary to sustain the plaintiffs' case [67] cannot be drawn. \*The defendant in his letters states that it is beyond his power to pay; but it was argued that they contained a promise to pay. In the letter of the 29th of May, 1874, there was a promise to pay, but it was upon condition that his means should first become somewhat better: I think that this condition has not been fulfilled. The additional £14 above £200 is a slight improvement, but, notwithstanding this circumstance, we must look at all the circumstances, and I do not think that the defendant's position has become better within his meaning. That letter of the 15th of September, 1876, does not contain an express promise to pay; and it has not been even shown that "the general commercial crisis" has given way.

*Judgment affirmed.*

Solicitors for plaintiffs: *Pritchard, Englefield & Co.*, for Edwin Storer, Manchester.

Solicitors for defendant: *Chester & Co.*, for John Farrington, Manchester.

[4 Common Pleas Division, 67.]

Nov. 5, 1878.

WOODS v. M'INNES.

*Practice—Leave to serve a Defendant in Scotland—Order xi, Rule 5, of the Orders of June, 1878.*

To obtain leave to serve a defendant in Scotland, it is not enough to show the amount of the claim, that the contract was made and the breach of it occurred in London, that the plaintiff and also the agent of the defendant (who signed the contract) reside in London, that all the plaintiff's witnesses reside in London, and that it would be more convenient and less expensive to try the action in London than in Scotland. The affidavit should go on to show in what respect, regard being had to the facilities for trying the cause in the neighborhood of the defendant's residence, it would be cheaper and more convenient to try in London.

[4 Common Pleas Division, 94.]

Nov. 25, 1878.

\*BLAKE V. THE ALBION LIFE ASSURANCE SOCIETY. [94]

*Evidence—Fraud by Agent of Company for their Benefit—Knowledge of Company—Proof of other Frauds—Course of Business.*

In an action against a company to recover a sum of money obtained by them from the plaintiff, through a fraud of the defendant's agent committed with their knowledge and for their benefit, evidence of similar frauds committed on persons other than the plaintiff, by the same agent, in the same manner, with the knowledge, and for the benefit, of the defendants is admissible on behalf of the plaintiff.

CLAIM: In November, 1874, the plaintiff, a clergyman living in Norfolk, saw an advertisement in a newspaper inserted by one Henry Howard, an agent of the defendants, offering to lend money upon personal security. The plaintiff applied to Howard by letter requesting a loan of £1,500, and received the following reply:

"11 Euston Square, London, N.W.

"21 Nov., 1874.

"Dear Sir,—I can entertain your application for an advance of £1,500 0s. 0d. for three or fourteen years at 4 per cent. interest per annum, payable half yearly. The £1,500 0s. 0d. to be repaid in one sum at the end of the term.

"You will have to insure your life in an insurance office, to be selected by me, for £1,500 0s. 0d., and deposit the policy as collateral security, the policy to be returned to you upon repayment of the money advanced, when you can either sell or keep for the benefit of your relatives. Let me know per return of post if this meets your views.—Yours truly,

"H. HOWARD."

1878

Hunt v. Wimbledon Local Board.

COTTON, L.J.: I also am of opinion that the judgment of Lindley, J., was right. First, I shall deal with the question as if there had been nothing special in the act of Parliament as to the contract entered into by the local board in this case. The common law being that a corporation cannot bind itself by contract except under seal; there are certain exceptions to that rule. There is one exception, that for the purpose of carrying out the ordinary business for which the corporation has been formed, it has power to bind itself without a contract under seal. But that is only in small matters necessary for the ordinary business of the corporation. There are, however, reasons why that cannot apply to this case, so as to bring the matter within such an exception. But it is urged that there is another exception, namely, that corporations are liable when goods have been supplied or work done in pursuance of a contract entered into not under seal, and the corporation have had the full benefit of such contract. I entertain very grave doubts whether such a corporation as this could be bound on any such ground, because the parties who have a beneficial enjoyment of anything supplied on the order of this body are not the corporation, but those for whom the corporation act as trustees. I cannot see that the principle can apply to a corporation constituted as this is, existing not for its own benefit, or for doing that from which it can derive any benefit, but as trustees for a certain portion of the public. But even if such a corporation can be so bound, in my opinion [60] there has not been such \*a beneficial user of these plans as to bring the case under that exception. No doubt there has been a certain user, but a user which produces no benefit to the corporation, or to the inhabitants of the district, for in consequence of the plans not being suitable the matter went no further than the using of the plans for the purpose of obtaining tenders; and when the tenders came in, it was found that the plans could not be carried into execution, and therefore the plans were not used for what, in my opinion, is the most important part of the purpose for which they were made, viz., for the purpose of the erection of offices for the use of this corporation.

Then what is the effect of the statute? It was argued that such a contract as this did not come within s. 174, because that section only applied to contracts necessary to carry this act into execution, and that obtaining these plans and building new offices did not come within that description; but unless this is a work necessary for carrying the act into execution, I do not see how it is possible that the



corporation had power to enter into any contract with reference to the matter. Certainly, if they had offices, it must be for the purpose of carrying the act into execution, and any contract relating to those offices is a contract for the purpose of carrying the act into execution. Therefore s. 174, in my opinion, applies to this contract, and whatever may be the case as regards subs. 3 of that section, in my opinion, subs. 1, which relates to the manner in which the contract between the two is to be made, is mandatory, and prevents any contract for an amount exceeding £50 from being entered into under the act except under seal.

The act gives power to the corporation to provide funds for the purpose of carrying into execution the provisions of the act, that is so say, to levy rates. And in my opinion the meaning of the act is, that as regards contracts where the amount exceeds £50, the board shall not charge the rates which they have power to levy except by a contract under seal. Therefore I am of opinion, subject however to what I am about to say, as regards the equitable doctrine, that there can be no decree in this case for the plaintiff. But it was said that the case came within the equitable \*doctrine of part performance. For the purpose of. [61 considering this question, I will deal with the cases of *Ungley v. Ungley* (') and *Wilson v. West Hartlepool Ry. Co.* ('), which were principally relied on. We must bear in mind that this is a contract which in former days the Court of Chancery would not have enforced. *Ungley v. Ungley* (') was an instance of part performance taking the case out of the Statute of Frauds. There had been a contract entered into by a father at his daughter's marriage in relation to a house; and as there was no agreement in writing, the Statute of Frauds would have prevented any action being maintained to enforce the contract. But possession had been given to the parties who sought to recover, and therefore the Court of Equity said there was such part performance as enabled it to act on parol evidence of the contract. Courts of equity, in my opinion, acted on this principle. The Statute of Frauds says that in certain cases no action shall be maintained unless there is evidence in writing to show what the contract was. But if a court of equity finds an overt act, such as the possession of land, then the presumption of a contract is raised, and the court will, in consequence of that overt act, allow parol evidence to be given for the purpose of ascertaining what the actual contract was. These are the cases in which the courts of equity

(') 5 Ch. D. 887; 22 Eng. R., 535.

(\*) 2 D J &amp; S., 475.

1878

Blake v. Albion Life Assurance Society.

then tendered on behalf of the plaintiff to prove a system of fraud; that Howard was a secret agent of the defendants, and that they had obtained the money paid to them by the plaintiff through the fraud of Howard committed for them and with their knowledge. This evidence was objected to, by counsel for the defendants, but the learned judge admitted it. The substance of it was as follows, viz., that advertisements signed either Howard, Gard, Wood, Rogers, Preston, Seymour, Holland, or some other name, and often expressed in the identical words of the advertisement seen by the plaintiff, appeared offering an advance of money; that the witness placed himself in correspondence with the advertisers, insured his life in the office of the defendants, and paid them a premium, which they divided with the person who had offered the loan; that unreasonable requisitions for further securities were made and the loan never advanced; that the policies were not renewed by the insurer; that they would not have been paid had they fallen in; that the names of the advertisers were all aliases of a man called "Wood," who was constantly for hours together, and, week after week for years had been, in close communication with the managing director and secretary, and sometimes other directors of the company; that checks drawn in favor of Wood, Gard, or Rogers, or of the other different names, were all indorsed with the respective names in the handwriting of Wood. The jury found a verdict for the plaintiff for the sum claimed.

A rule for a new trial having been granted on the ground of misreception of evidence,

*Willis, Q.C., and Tindal Atkinson*, showed cause: The action is to recover money obtained by means of a conspiracy to defraud, and the nature of the conspiracy is described in the claim. The evidence objected to was material to prove the conspiracy, and to substantiate the particular issues raised on the pleadings. It was necessary and admissible to support the allegation in the claim that Howard, with the knowledge and contrivance of the defendants, changed his name and address from time to time, 98] and \*also that he was their agent, and for a long while in secret communication with them. The course of business was so arranged by the defendants and Howard that an isolated transaction such as that with the plaintiff might seem, or at least be plausibly declared to be fair. But evidence of several other similar transactions was cogent proof of the fraudulent nature of that one which by itself appeared legitimate, or, at worst, ambiguous. When the substance

of this evidence was stated in certain paragraphs of the claim they were struck out by this court; and, rightly, because they violated the rule against pleading evidence: *Blake v. Albion Life Assurance Society* (<sup>1</sup>). But the evidence was properly received at the trial. It was material to the issues: *Reg. v. Tyson* (<sup>2</sup>). The defendants will contend that the evidence might have been admissible in an action against the individual managers and directors of the insurance office, but was not so as against the company itself. But the company is liable for the fraud of its agents committed in the course of its business. An action of deceit may be maintained against it and money fraudulently obtained for it be recovered, *Mackay v. Commercial Bank of New Brunswick* (<sup>3</sup>), and the evidence here was given to establish the facts creating that liability.

*McIntyre*, Q.C., and *Patchett*, Q.C., in support of the rule: The evidence was inadmissible. The claim alleges certain representations and acts of Howard known to the company. The evidence in question was of transactions between persons other than the plaintiff, and persons other than Howard. This is an attempt to prove the fraud of one man on another by showing the frauds of others on others. The course of business of the defendants in transactions with different persons was not relevant to the cause of action, nor even evidence to support it, as the Lord Chief Justice and Mr. Justice Brett said in *Blake v. Albion Life Assurance Society* (<sup>1</sup>).

[LORD COLERIDGE, C.J.: If our observations there were, in effect, only that you cannot prove one offence by merely proving another, they are right, but will not assist the argument. If they convey the idea that, to complete the chain of proof in a case of fraud, \*other like frauds by the [99 same offenders cannot be shown by evidence, our ruling was wrong, and I will not be bound by it.]

On the trial of a man for burglary in one county the prosecution could not give evidence of burglaries committed by him in another. It is not just that persons who come to answer a specific charge should be surprised by accusations which they are unprepared to meet. Even if the evidence could have been given in an action against those officers of the company who were shown to have been connected with Howard, it was not admissible against the defendants. "An incorporated company cannot, in its corporate char-

(<sup>1</sup>) 45 L. J. (C.P.), 663.

(<sup>2</sup>) Law Rep., 1 C. C. R., 107.

(<sup>3</sup>) Law Rep., 5 P. C., 394.

1878

Blake v. Albion Life Assurance Society.

acter, be called upon to answer in an action for deceit:" per Lord Cranworth, *Western Bank of Scotland v. Addie* (').

[LORD COLERIDGE: But this is an action to recover money obtained by fraud.]

Then it cannot be maintained, for the plaintiff has had the benefit of life assurance during a year, and there can be no *restitutio in integrum*. The reasoning on which in *Barwick v. English Joint Stock Bank* (') principals are held liable for the frauds of agents has been lately declared to be unsatisfactory: see per Bramwell, L.J., *Weir v. Bell* (').

GROVE, J. (after relating the substance of the claim) said: Shortly stated, this is an action for money had and received without consideration, and obtained by the fraud either of the defendant company itself, or of persons who transacted the business of and for the benefit of the company; and, even if treated as in one sense an action of deceit, the claim is not made for damages occasioned by the deceit, but for a return of the money which the plaintiff has paid, and the expenses. No doubt, on the cases, there may fairly be a question whether an action of deceit could be brought against an incorporated company, or whether a person could recover damages against a company by merely showing fraud of its agent, without knowledge of the company. But it is admitted, or clearly said, in the authorities, that where a company has obtained a benefit through the fraud of an agent, the person defrauded may recover back his [100] money from the company; so the \*plaintiff had to prove here that he paid his money in consideration of certain statements and acts of the secretary, directors, and managers of the company; that the circumstances under which they got the money were fraudulent; that the transaction was not *bona fide*, but a fraudulent transaction to get his money without any consideration; and that the money found its way into the coffers of the company. Of all those elements in his case, except the fraud itself, there was strong and unquestionably admissible evidence at the trial. Therefore, if that money which went into the coffers of the company was obtained by fraud of the manager of the company, the plaintiff would be entitled to recover. But the difficulty in the plaintiff's case was how to prove that fraud. How was he to show that the transaction, which looked honest, or, at worst, equivocal, was in fact fraudulent?

In the mere facts that Howard, by requiring further securities, virtually broke his undertaking to grant the loan,

(') Law Rep., 1 Sc. & D., 145, at p. 166.

(') Law Rep., 2 Ex., 259.

(') 3 Ex. D., 255, at p. 244.

and received from the company part of the premium for introducing the insurer, there was nothing conclusive of fraud, or so pregnant with it that a jury might properly be expected to find a verdict of fraud in the case. Then, on behalf of the plaintiff other evidence was tendered for the purpose of satisfying the jury of fraud, and that the money was never intended to be lent; that the transaction was not *bona fide*; that the policy was not a real but a sham one, and that the amount due upon it would never have been paid to anybody. Now, these facts would not appear upon the face of the transaction between the plaintiff and Howard. But on behalf of the plaintiff evidence was tendered in order to prove in addition that Howard was an alias, and perhaps a mere fictitious name which the company made use of. The defendants contend that this evidence is inadmissible; that the plaintiff is not entitled to show general transactions on behalf of the managers of the company by which they have both in this and in other similar cases put forward a fictitious or unreal name, and obtained money on the faith of exactly similar promises of loans which they have never advanced to the persons to whom they promised them; that they never repaid to the parties the amounts paid on the policies of insurance, though it had been demanded upon the conditions not being fulfilled on which the promise was first made; and that in \*the large majority of cases, if not in all, the policies [101 were never renewed after the year, and the premiums dropped into the hands of the company. The plaintiff offered to prove that general dealing, and, further, that not only was Howard a fictitious name, but that precisely analogous transactions went on with eight or ten other fictitious names, none of them shown to represent a true person, several of them admitted by the secretary and manager of the company to be fictitious persons, and that other intending borrowers were thereby defrauded of money. Was that admissible evidence or not? I am of opinion that it was admissible. It was admissible, firstly, upon the logical ground that in a vast number of cases such evidence is the only means of establishing fraud. Very many fraudulent transactions are apparently fair until the fraud is shown by proving virtually what has happened,—the real facts underlying the evident ones; and one great element of fraud is the intent of the parties. The jury had to consider the question, Did the defendants or their managers do this through the fictitious name of Howard, for the purpose and with the intent of defrauding the plaintiff of his money; and did they ever

1878

Blake v. Albion Life Assurance Society.

intend to pay the money back again under any circumstances? Intent, motive, design, and complicity, together with acts, may show fraud. It seems to me that if evidence of this kind were inadmissible, fraud would frequently never be proved. A man might commit fraud upon twenty different persons by begging letters or otherwise, and, if a single letter to one individual only were proved, the evidence would probably be insufficient to convict him upon. But if it were proved that he had written similar letters to twenty persons; that he had received money from them on promises to return it which he had never fulfilled; that he told fictitious stories, and gave false names, the jury would doubtless be satisfied of his guilt in the particular case.

Then, secondly, is there any rule of law rendering this evidence inadmissible? I am of opinion that there is none. I think that when a person is alleged to be guilty of an offence which *per se* cannot be brought home to him by proving his mere act without explaining his animus, purpose, or object in doing it, the law permits evidence of other acts done by the same person to be given, for the purpose [102] of such explanation. No less than three \*reported cases establish the proposition that even in trials for murder, evidence of other acts ending in murder, acts, for example, of poisoning, will be admitted to show the intent with which the act charged was done, and that the administration of the poison in the particular case was not accidental but designed.

In other criminal cases where intent is likewise the gist of the offence, such evidence is undoubtedly admissible. A man cannot be properly convicted of uttering counterfeit coin merely because he has paid away a bad shilling, for any one may happen to receive a bad shilling in change and to pass it without any wrongful intent. It must be shown that the accused acted with knowledge that the coin was bad. This may be proved by evidence that he did similar acts and under similar circumstances, so as to bring the fraud home to him. There is no difference that I am aware of between the rule in civil and in criminal cases on this subject. The criminal law, having regard to life and liberty is, if anything, more strict than the civil. I find nothing in principle or law to satisfy me that the evidence was not admissible. I will assume that Henry Howard was the person who committed the fraud, and that it was to be brought home to him. Then I apprehend that, his transaction with the plaintiff being ambiguous on its face, no one could reasonably dispute the admissibility in evidence of other acts of Henry Howard of the same sort with other

persons of identically the same character, which, if they were wholly severed from the particular transaction, might not be admissible. Evidence may be given of other acts if they are sufficiently connected with the case, to show that Henry Howard in doing the act with which he was charged did intend and did commit a fraud, or, at all events, they are evidence which the jury might reasonably consider to bear out the inference that he committed a fraud. If that be so, the next step is to ask, Can this evidence be given as regards a third person? Without saying that the assumption may not be wrong, I will assume for the present that if the managers of the company had been merely proved to have been guilty of similar frauds unconnected with the fraud upon the plaintiff, otherwise than by their resemblance in character, they might not have been admissible. That appears to have been in my Lord's mind when the motion came before this court \*to strike out [103 from the statement of claim allegations of other transactions. But here the other frauds given in evidence are identified with the person or with the fictitious name, by whom or through which this fraud was committed. Suppose Howard to be proved to be an agent of the defendants, and that he committed a large number of these frauds by which the defendants profit, and that it can be shown, by giving evidence of these frauds, that the defendants perfectly well knew they were frauds, and that Howard was the man who committed them for their use, and that the managers—I will not say the defendants, but the managers of the defendants—accepted the profit of them, and got money from the persons defrauded through the agency of a real man Howard. It appears to me that then the evidence is admissible, because that which, taken alone, might have been an honest transaction becomes evidently fraudulent upon proof of other similar transactions being shams, and that the defendants by exactly the same means had pocketed large sums of money; the difficulty arising from possibility of mistake in the case is removed; and further, a fact which cannot be shown by the evidence of a single transaction is also proved, viz., that by a similar series of frauds the defendants have put money into their pockets which they ought not to do, and therefore the jury may reasonably be called upon to infer that the defendants intended to pocket the money of the plaintiff. Principle is in favor of the admissibility of the evidence. No case has been cited to the contrary, while a variety of cases—particularly the criminal ones which I have mentioned—show that

such evidence is admissible to prove intent of fraud, and that the transaction was not *bona fide*.

Another branch of the subject now presents itself. Howard might be a real name of the agent, but might also be a fictitious one, as indeed was, I think, in fact established. Then it seems to me that the evidence would be admissible on another ground, viz., to satisfy the jury that the transaction was a fraud, because the defendants or their manager had for the purpose of obtaining money used a fictitious name. The use of one such name might perhaps be plausibly explained by the defendants imputing it to mistake, and to their belief that the man's name really was Howard, although the plaintiff proved that Howard was not the [104] \*name of the man. Could not then the plaintiff proceed to show that the explanation was fallacious, by proving that Howard was only one fictitious name, and that the defendants had dealt with A. under the name of an agent called Howard, with B. under the name of an agent called Gard, and so on? Would not that be evidence for a jury tending to prove that the name Howard was a fraudulent fiction, that the use of it was not a mistake, but part of the fraud concocted by the defendants, and that they did business under fictitious names? How could this be shown otherwise? The plaintiff proposed to bring the case home to the company by proving first, that they knew Howard was a false name, and secondly, that the very same man they called Howard they also called Gard, Rogers, and those various other names. I fail to see why that evidence was not admissible. It formed a very material part of the evidence given. All the evidence given would be in my mind clearly admissible for the purpose of showing that they entered in their books different names, all of which were proved to be fictitious.

But let me regard the case from another point of view. Suppose there were no real man in the transactions whom these names were said to represent, and that they were wholly fictitious; that there was no Howard, Gard, Rogers, Brown, &c., but that a clerk or a porter of the defendants was kept at some house in Euston Square, who merely forwarded letters addressed to Howard or Gard, or any of those names, on to the managers of the defendants. That may possibly be the truth. Suppose, then, that was the state of fact, as it certainly was, with respect to a large number of these fictitious names, is not a party in an action for fraud to show that his correspondent was a fiction, or none other than the managers and directors of this company, who always corre-



sponded under fictitious names to get money into the hands of the company without themselves being liable, and to keep out of danger of discovery? Howard did not represent himself in any way as an agent of, or in connection with, the insurance company, and I can think of no rational argument against the admissibility of the evidence offered to show that the manager and secretary of the company were trading with the public—not as the Albion Insurance Society, but—as persons having a direct \*interest in the re- [105] ceipts, through another person unconnected with the company, who asked proposing borrowers of money to insure their lives in a company, to be named by Howard, or whatever the fictitious name was. Such a request from a money lender would seem natural; it is a common and very reasonable practice for the borrower of money to be required to insure his life in a company approved by the lender.

It would therefore be a natural supposition of the plaintiff that Howard desired an insurance in a good solvent company, and that there was nothing novel in his making it a condition of the loan that the plaintiff should insure in a company to be named by Howard.

I think the plaintiff was clearly entitled to show, not only that Howard was connected with this insurance company, but that the insurance company were the principals and were the persons committing the fraud. I am quite convinced that the evidence was clearly admissible.

Great doubts, even more than doubts, might be raised if this case were an action against the company for deceit. The statement of claim certainly does allege fraud and deceit by Howard as well as by the company; in substance, however, it is not a claim founded upon deceit, but a claim for the return of the money which has been obtained from the plaintiff by the deceit. There was ample evidence to show that the money went into the pockets of the company. Whether he is entitled to recover the whole of the £59, or part of it, or part of the expenses, is not the matter before us on this rule. *Western Bank of Scotland v. Addie*(<sup>1</sup>) affords authority for saying that the plaintiff can recover in this action money received from him by the defendants, through frauds of their agent, committed for their benefit. I think the evidence was rightly received, and that the rule should be discharged.

LINDLEY, J.: I am of the same opinion. This is an action by the plaintiff to recover his money which the defendants have got. He says that he was induced by the

(<sup>1</sup>) Law Rep., 1 Sc. & D., 145.

1878

Blake v. Albion Life Assurance Society.

fraud of a person called Howard to pay the money to them, 106] that at the time they took it \*they knew that the plaintiff had been so induced by Howard's fraud to pay it; and that under those circumstances the defendants cannot retain the money. The question is, how is such a case to be proved? We are asked by the defendants to shut out all evidence tending to show the nature of the business which the company carried on, and to confine our view simply to what took place between the plaintiff on the one side and Howard and the company on the other. That is to say, we are asked to exclude all light, but that which the particular transaction throws upon the case. There is no principle to justify our doing so, and to ask us to do so is startling. The plaintiff proved what took place between him and Howard and the company. Nothing could seem, at first sight, more plain and straightforward, and there would be no appearance of fraud; but then the plaintiff proposed to adduce evidence to show that the transaction was one of a fraudulent class. Was he, or was he not, to be precluded from doing it? I think that he was quite at liberty to put his case in that way, and could only do so by going into a great number of other transactions having some features in common with this. I agree that in order to prove that A. has committed a fraud on B., it is neither sufficient nor even relevant to prove that A. committed fraud upon C., D., and E. Stopping there, I admit that proposition. But let it be shown that the fraud on B. is one of a class of other transactions, having common features, then I disagree altogether with that proposition. The plaintiff had to make out that Howard, whoever he was, induced him to part with this money upon what is in substance a false pretence, the false pretence being that he would get a loan if he did certain things. Was he not at liberty to show falsity of that pretence by proving that Howard was in the habit of carrying on business in that way, and got money from A., B., C., and D., under the same false pretence that he would procure loans when he never intended to procure, and never did in fact procure them? Further, the plaintiff offered to show that the directors and managers of the defendants' business well knew the conduct of Howard, and the mode in which he induced people to come to the company's office to insure. If such evidence is to be excluded, it must be under some strict rule 107] which has not been pointed out, and which \*I do not see the expediency of inventing. The question when closely examined, appears to be whether by enlarging the view light can be thrown on the true nature of the transaction, which,

taken by itself, may be innocent or may be fraudulent? I think this may be done. The answer to the objection that evidence of frauds on other persons cannot be admitted, is that this transaction is one of a class, that there are features in common, the features in common being the false pretence and a knowledge of that false pretence on the part of the defendant company, and the moment that is shown the plaintiff's case is established. I do not think it necessary to decide the point as to the liability of companies for frauds of agents. All we have to consider is whether this evidence was admissible in an action of the present kind. For the reasons I have given, in addition to those of my Brother Grove, I am of opinion that the rule must be discharged.

LORD COLERIDGE, C.J.: I am of the same opinion. Interesting and difficult questions have been raised which must be decided when necessary, but which for the purposes of to-day I do not think it necessary to decide, or even consider. The rule is before us on one single ground, and the whole question now depends on that single issue, viz., was evidence improperly received at the trial? No other point is open to the defendants, and we have none other to decide. To arrive at a proper conclusion we must look at the claim in support of which the evidence was tendered. It may be that there might have been an objection to the claim; that is one of the points which appear to me not to arise. The judge at *Nisi Prius* has to look at the claim as it stands to see if the evidence is properly receivable in support of it. Now the general outline of the fraud was this: There is an insurance company, there is a person not a member of the insurance company, nor apparently an agent of it, a person called by various names whom, for purposes of convenience in this judgment, I will call Howard. Howard advertises a loan of money. The plaintiff is induced by the advertisement to enter into negotiations for a loan. Howard, as part of the terms of the loan, insists on insurance for a year in the defendant company's office, and the insurance is to be effected and the premium paid down before the loan. [108. The insurance is effected and the premium paid, and outwardly there is no connection between the company and Howard. After the premium is paid and the receipt of the policy by the plaintiff, the conditions which the jury have found to be unreasonable and really fraudulent—conditions to which no one could be expected to conform—were added to the terms on which the money was to be advanced and on which no money was advanced. The premium had been paid and the policy effected. An action is brought

1878

Blake v. Albion Life Assurance Society.

to recover the money paid under those circumstances. So stated there is obviously nothing which might not be perfectly *bona fide*. If Howard, instead of requiring the insurance to be effected in the Albion, had required it to be effected in some well-known office of high repute, the plaintiff would, doubtless, have put up with the loss of the premium, thinking it absurd to suppose or assert that there could be any connection between such an insurance office and Howard, or that any one would believe it. And if this insurance with the Albion had been an isolated transaction no jury would have found a verdict for the plaintiff. But, from circumstances which revolving years brought to the attention of the plaintiff, he was satisfied that, although no outward connection existed, there was a most intimate real connection between Howard and the defendants; that the transaction between himself and Howard was quite well known to the defendants; that they had got the benefit of the premiums through arrangements between Howard and themselves; that it never had been contemplated by the defendants or Howard that a farthing's worth of the benefit should accrue to the plaintiff, but that the whole reality of the transactions should be payment of a premium, which premium was divided in equal shares between the defendants and Howard. That came to his knowledge, and also it came to his notice that this was the course of business carried on for years with the knowledge of the defendants, and greatly to the benefit of the directors by obtaining in large numbers the premiums on those policies of which there was no renewal, and on which the premiums were paid. Now if that state of things could be shown, and the substance of it is stated in the claim, it would be wasting words to declare it to be a gross and abominable fraud; and it is said that although, if such state of things could be [109] proved, it would be \*a gross and abominable fraud, and the only way of showing it to be so would be to show that it was not an isolated case, but one of a class effected for years in great numbers through the same instrumentality, and with the same knowledge on the part of the defendants, yet the rules of evidence absolutely prevent that being shown. Some years ago, as great lawyers then complained, the rules of English evidence, professedly on the ground of excluding all possibility of prejudice, bias, or error, made inadmissible the evidence of any persons having the slightest interest in the case, and many claims perfectly just and fair were defeated for want of that evidence. Such was then the law; but it is altered, and, with a few excep-

tions on the ground of public policy, now is, that all which can throw light on the disputed transaction is admitted—not of course matters of mere prejudice, nor anything open to real moral or sensible objection, but all things which fairly throw light on the case. And in any but an English court, and to the mind of any but an English lawyer, the controversy whether this evidence is or is not evidence which a court of justice should receive would seem, I think, supremely ridiculous, because every one would say that the evidence was most cogent and material to the plaintiff's claim. But, of course, some legal ground for receiving it must be shown. I think it was admissible on two distinct and definite grounds. The defendants' company are sued in fact to rescind the contract, and to get back the money which has been obtained by that contract, because the contract was fraudulent, and obtained by fraud of their agent. Two things were therefore necessary to be established—agency and fraud. I do not say first agency and secondly fraud, because I hardly know which one logically stands first. Now, except as to Howard, the agency was beyond controversy. The secretary, manager, and two or three other persons were manifestly agents to effect insurances. They were agents of the company to effect its business, and it is said that, according to well established rules, the company is responsible for what these agents do in the discharge of their duties of agency. That is clear with respect to every one but Howard. It is at first doubtful as to Howard, but it appears to me that you can show the agency of Howard by this evidence none the less because in proving a fact necessarily relevant to the plaintiff's claim \*you must necessarily prove [110 matters also prejudicial to the conduct of the defendants. And in this case it seems to me that the evidence was clearly admissible for the purpose of proving the agency of Howard. [His Lordship related the substance of the evidence as hereinbefore set out.] It was surely cogent evidence to show that this man Howard, whom no one ever saw, was Wood; that Wood was an agent of the company; that the mode in which he transacted this business was well known to its directors; and that the company in case after case benefited by his frauds; and thus his agency, and the communication between him and the company in the particular case under discussion, was established in the ordinary way, by proving repeated acts of agency.

For, directly it is shown that Howard was the person represented by the six or seven different names, and that for a number of years and under those names this business

was conducted for the benefit of the company, who received the money and passed it to their account in the bank, I think it vain to contend that such evidence is not admissible as evidence of the agency of Howard. That is one ground of admissibility. But agency would not be sufficient, because this being an action against the company, the plaintiff must show that the fraudulent acts of the agent were either done with the knowledge, or at least in the service of the company, and were acts of which the company got the benefit. This second point is shown by the same evidence which establishes the first. There remains the point whether those acts were fraudulent in fact. Was the act in this particular case of that character? The observation of my Brother Lindley is irresistible; suppose this transaction with the plaintiff had stood alone, no one would say that it, while isolated, was conclusive, or even, perhaps, very strong evidence of fraud on the part of the company, but when it appears that the person passing under the different names was one and the same agent, and that the character of his acts must, from their repetition and the way in which they were disguised, have been known to the defendants, and that the acts all ended in the getting of money from persons without the least corresponding benefit to them, I think it is proved that the acts were fraudulent in their nature; and then the two points which the plaintiff had to make out, viz., that [111] Howard was the \*agent who committed the frauds, and that by those frauds obtained money which the company had, and by which they benefited, are made out. For the reasons already stated by my Brothers Lindley and Grove, I think that the case does not fall within the rule excluding *res inter alios acta*; the facts given in evidence were so in one sense, but they were not tendered for the purpose of prejudice; they were tendered to make out the necessary links in the chain of the plaintiff's proof in this action. If so, are they within the authority of *Blake v. Albion Life Assurance Society*?<sup>(1)</sup> I do not think they are. It has been admitted in argument that the decision of that case is one with which no one can be dissatisfied. Certain paragraphs were struck out from the claim, and I think rightly struck out, and they will be seen to be open to the objection that they contain statements of *res inter alios acta*, without any attempt to connect the *res inter alios acta* with the necessary links in the proof of *res inter partes acta* which have to be proved. The language of the two judges who first expressed their opinions in that case might, per-

(1) 45 L. J. (C.P.), 663.

haps, have been more cautiously expressed, but regard must be had to the subject then before the court and the terms of the paragraphs. I do not think that the decision need bear on this. If it did I should be the first to withdraw from it. Indeed, at one time I thought it might bear the construction put on it by Mr. M'Intyre, and did not hesitate to say that if so it was wrong, and ought not to be followed. But I think that a more lenient interpretation which has already been hinted at, and of which the words are at least patient, may be put upon it when the decision is hereafter cited. I think this evidence was properly received, and that the rule should be discharged.

*Rule discharged.*

Solicitor for plaintiff: *J. Robinson.*

Solicitors for defendants: *Phelps, Bennett & Woodforde.*

[4 Common Pleas Division, 118.]

Feb. 2, 1879.

[IN THE COURT OF APPEAL.]

**\*THE LONDON AND BRIGHTON RAILWAY COMPANY [118  
V. WATSON (').]**

*Railway Company—By-law, Validity of—Passenger travelling without a Ticket—Penalty—Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 108, 109, 145.*

A by-law of a railway company provided that "any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket" to any duly authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey."

By s. 109 of the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), by-laws are authorized to be made, and by s. 145 penalties for forfeitures imposed by by-laws are recoverable before justices:

*Held*, that the above by-law did not create a debt recoverable in a court of civil jurisdiction.

**APPEAL** from the judgment of the Common Pleas Division in favor of the defendant (\*).

Action by the plaintiffs to recover from the defendant the balance of a railway fare from New Croydon to Lower Norwood, two stations on the plaintiffs' railway.

The defendant was a second class passenger on the plaintiffs' railway from Norwood Junction to Lower Norwood, and travelled without having taken any ticket. On his arrival at Lower Norwood he was unable to produce and give up his ticket, but offered to pay the fare from Norwood Junction to Lower Norwood. This was refused by the plaintiffs' ticket collector, who demanded the fare from New

(<sup>1</sup>) Affirming, *ante*, p. 277.

(\*) 3 C. P. D., 429.

1879

London and Brighton Railway Co. v. Watson.

Croydon to Lower Norwood, New Croydon being the station whence the train originally started.

The plaintiffs relied on the following by-law :

By-law No. 1. No passenger will be allowed to enter any carriage used on the railway or to travel therein upon any railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket (whether a contract or [119] season ticket, or otherwise), to any \*duly authorized servant of the company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of the journey.

1878. Dec. 20. *Jeune*, and *T. Mosley*, for the plaintiffs.  
*Macmorran*, and *Macaskie*, for the defendant.

*Cur. adv. vult.*

Feb. 1. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.,) was delivered by

BRAMWELL, L.J.: If the sum claimed in this case is a penalty, it is not recoverable in the county court nor elsewhere than before justices, as provided by 8 & 9 Vict. c. 20, s. 145. For it is the case of a liability created by statute, with a special provision for its enforcement, and with provisions inconsistent with there being a concurrent jurisdiction in the ordinary courts, see s. 151: *Cates v. Knight* (1). Accordingly it was argued for the plaintiffs that it was a fare and not a penalty, and thereupon recoverable not before justices as a penalty, but as a debt in the county court. I am of opinion that it is not a debt, that the plaintiffs have no power to create such a debt. The statute, see s. 109, gives power to enforce by-laws only by a penalty against the offender. We have no doubt that a railway company may demand and insist on payment before taking a passenger, and that if they give him credit for his fare they may insist on any sum they think fit, and if he agrees to it that would be a valid debt, and recoverable as such. But if the passenger does not agree to it he may indeed be a trespasser in getting into the carriage, and liable to damages as such, or they may waive the tort and recover the fare on the *quantum meruit* scale; but they cannot fix and insist on a fare at their pleasure. In this case it is only 1*d.*, but if they can fix it at their pleasure they might make it 5*s.* or £5. They

(1) 3 T. R., 442, and see Lord Coleridge, C.J., 3 C. P. D., at p. 432; *ante*, p. 277.



Harris v. Warre.

1879

have not sued for a trespass or tort, but for a fare. They have not shown, and of course could not show, that the defendant ought to pay more than the \*ordinary [120 fare, consequently they fail, and the judgment should be affirmed.

My Brother Brett wishes to add to this, that in his opinion the claim is based on that which is repugnant to the statute, inasmuch as the statute only authorizes the exacting of an additional sum in the case of fraudulent conduct. Cotton, L.J., and myself desire it to be understood that we express no opinion either one way or the other on that matter.

*Judgment affirmed.*

Solicitors for plaintiffs: *Norton, Rose & Brewer.*

Solicitor for defendant: *H. J. Smith.*

Plaintiff having paid for passage over defendants' route of street railway, was given at an intermediate point thereon, in return for an additional sum paid by him, a ticket on which were these words: "Third Avenue Railroad Company. Good only from Sixty-fifth Street up to Yorkville and Harlem for a continuous ride. By order of the President." The ticket was indorsed, "Conductor's check, July 6, 1878." Plaintiff did not then use the ticket, but afterwards and on the same day he entered

one of defendants' cars below, and paid fare to such intermediate point, and at a place above said point tendered the conductor the ticket, which was not accepted, and on his refusal to again pay fare, he was ejected from the car: Held, that in the absence of knowledge by the plaintiff of any rule limiting his rights under said ticket, the company was liable for the above act of its servant: *McMahon v. Third Av. R. R.*, 47 N. Y. Super. Ct. R., 282.

[4 Common Pleas Division, 125.]

March 6, 1879.

\*HARRIS V. WARRE.

[125

*Pleading—Claim—Libel—Defamatory Words not set out—Malicious Prosecution—Charge to Police—Demurrer—Judicature Act, Order XIX, Rules 4, 24.*

A claim alleged that the defendant wrote and sent to a chief constable letters charging the plaintiff with a murder, and required his arrest: also, that the defendant sent to a superintendent of police charging the plaintiff with the murder, and required his arrest; and that the superintendent, in consequence, endeavored to arrest the plaintiff on several occasions, but was unable to meet with him; that the defendant had no reasonable or probable cause for making the charge, and the same was false, and made maliciously and with intent to injure the plaintiff, whose credit and reputation were thereby injured.

On demurrer:

*Held*, that the claim was bad; because, if it was for libel or slander, the defamatory words were not set out, as, even in pleading under the Judicature Act, they ought to be; if for malicious prosecution, none had been instituted before a judicial officer.

1879

Harris v. Warre.

CLAIM: that the plaintiff was a farmer, and the defendant a rector in Somersetshire.

In June, 1878, Frederick Merry, a packer in the employ of the Great Western Railway Company, was found dead on the railway between Taunton and Watchet, and at the inquest held on the body of Merry a verdict of accidental death was returned.

The defendant subsequently wrote and sent to the chief constable of the county letters in which he charged the plaintiff with having been concerned in or guilty of the murder of the said Frederick Merry, and required the chief constable to cause the plaintiff to be arrested on such charge.

The defendant also sent to the superintendent of police for the district wherein the plaintiff resided, and charged the plaintiff with having been guilty of the murder, and required the superintendent to arrest the plaintiff upon the said charge.

The superintendent of police, in consequence thereof, endeavored himself to arrest the plaintiff, and directed a police constable to proceed to the plaintiff's residence and to arrest and detain the plaintiff upon the said charge of murder so made against him by the defendant.

The police constable accordingly on several occasions went [26] to \*the plaintiff's residence and endeavored to arrest him, and would have done so but that he was unable to meet with the plaintiff.

The defendant had no reasonable or probable cause for making the said charge, and the same was false, and was made by the defendant maliciously and with intent to injure the plaintiff.

By reason of the said wrongful and malicious acts of the defendant the plaintiff's credit and reputation had been greatly injured, and the plaintiff had suffered great loss and injury.

The plaintiff claimed £1,000 damages.

Demurrer, on the ground that no prosecution of any kind was shown, and that if the plaintiff meant to complain of libel or slander the words ought to have been set out, and on other grounds sufficient in law to sustain the demurrer.

*Bray*, for the defendant: First. If the claim is for libel it is bad, because the defamatory words are not set out. The authorities establishing this proposition have been lately reviewed and confirmed in *Bradlaugh v. The Queen* (<sup>1</sup>); that, indeed, was a criminal case, but there is no difference between civil and criminal pleading in this respect.

(<sup>1</sup>) 3 Q. B. D., 607; 28 Eng. R., 482.

Amongst those cases were *Cook v. Cox* <sup>(1)</sup>, an action for slander; and *Wright v. Clements* <sup>(2)</sup>, an action for libel. "In actions for libel," said Lord Tenterden, "the law requires the very words of the libel to be set out in the declaration, in order that the court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading": *Wright v. Clements* <sup>(3)</sup>. The Common Law Procedure Acts made no difference, but merely disposed of prefatory averments in libel. Nor have the Judicature Acts or Orders altered the law. Order XIX, Rule 24, allows documents to be abstracted in pleading "unless the precise words of the document or any part thereof are material." But here they are material, and therefore within the exception.

Secondly. If the claim is for malicious prosecution, it does not allege the necessary facts to support the action, which cannot lie unless proceedings have been taken before a judicial officer: *Austin v. Dowling* <sup>(4)</sup>.

\*[LORD COLERIDGE, C.J., cited Starkie on Slander [127 and Libel, 2d ed., vol. i, p. 445: "The declaration must show: 1st. A prosecution instituted and determined. 2dly. That the defendant acted maliciously and without probable cause in the prosecution of a false charge. 3dly: The damage resulting to the plaintiff."]

*Petheram*, for the plaintiff: First. If no right of action is stated in the claim it discloses a wrong without a remedy. A letter containing a charge of murder is written to the police, and has its effect. But the plaintiff cannot get sight of the words in the letter. He therefore states the substance. Surely that claim will be made out if the superintendent when called as a witness at the trial, although he may have destroyed the letter and forgotten the words, states that they amounted to a charge of murder.

[LORD COLERIDGE, C.J.: A similar case came before us where the recipient of a libellous letter would not disclose the contents to the plaintiff, who thereupon asked us to order its production. We could only say that the plaintiff must declare as best he could, and if there was a variance between the libel laid in the declaration and the words proved at the trial, he must request the judge to amend it.]

The Judicature Act, Order XIX, Rule 4, has removed the necessity for setting out the exact words: "Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies." The

<sup>(1)</sup> 3 M. & S., 110.

<sup>(2)</sup> 3 B. & Ald., 503.

<sup>(3)</sup> 3 B. & Ald., at p. 506.

<sup>(4)</sup> Law Rep., 5 C. P., 534.

1879

Harris v. Warre.

“material facts” are stated in this claim, viz., that the defendant wrote a letter charging the plaintiff with murder.

[LORD COLERIDGE, C.J.: In a libel the words used are the “material facts,” and the words used here may not have amounted to any such charge.

DENMAN, J.: It would be very inconvenient if a plaintiff might allege that, according to his construction, a certain letter was a libel, without giving the court an opportunity of judging whether it was so or not.]

That the letter in question charged murder is admitted by the demurrer.

Secondly. The claim alleges that the defendant maliciously put the law in motion against the plaintiff whereby he was pursued and damnified. This is a cause of action, although [28] there was no \*malicious prosecution or malicious arrest because the plaintiff escaped.

LORD COLERIDGE, C.J.: I am of opinion that this demurrer must be allowed. For the purposes of this decision I will assume that an improper thing has been done by the defendant of which the plaintiff complains, first, alleging a libel, and, secondly, malicious prosecution. With respect to the latter, his learned counsel admits that according to established rules the statement of claim does not disclose a ground of action. No prosecution was instituted and determined. As to the libel the claim is in most general terms. It is conceded that this is an entirely new form of pleading, and that heretofore, both in slander and libel, it was usual to set out the words, according to a rule, not merely technical, but founded on the substantial reason, stated by the judges of authority to be that the defendant is entitled to know the precise charge against him and cannot shape his case until he knows. In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them. For a long time it has been held to be enough to prove the substance of the words alleged in the declaration, but if there was difference between both the form and substance of the words alleged, and of the words proved, the defendant was entitled to succeed. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used *those* defamatory expressions alleged, which is the fact on which the case depends.

I find it laid down in a book of the highest authority that,

"it has long been settled that the declaration or indictment must profess to set out the very words published, and that it is not sufficient to describe them by their usual substance and effect:" Starkie's Law of Slander and Libel, 2d ed., vol. i, p. 362. That doctrine was so stated many years ago. It was lately reaffirmed by the decision of the Court of Appeal in language not less strong. Such, then, was the general law, and Mr. Petheram \*admits that before the [129 Judicature Act his contention would not have been sustained; but he says that Order XIX, Rule 4, enables him to claim, as he has done in this case. The rule declares that "every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved. . . ." I agree with him that we are bound by that rule, but for the reasons already given I think the words alleged to be libellous are the "material facts" in the present case. Moreover, the conclusion of the rule is: "Forms similar to those in Appendix C. hereto may be used." I turn then to the Appendix C. and find no form of claim in Libel or Slander. Therefore I think the Judicature Act leaves the law as it stood with respect to setting out the defamatory words in those actions; and that the claim is bad on demurrer.

DENMAN, J.: I am entirely of the same opinion, and will only add that Order XIX, Rule 24, cited by Mr. Petheram, seems not to aid his argument, for here the defamatory words are material, and the case comes therefore within the exception to the rule. According to all the decisions in ancient and modern times, the words are most material in actions for libel and slander.

*Leave to amend within a fortnight on payment  
of costs, or judgment for the defendant.*

Solicitors for plaintiff: *Whitaker & Woolbert.*

Solicitors for defendant: *Torr, Janeways, Torr & Gribble.*

[4 Common Pleas Division, 130.]

March 7, 1879.

130]

**\*DOLPHIN V. LAYTON.**

*County Court—Garnishment—Attachment of Money in the Hands of the Court.*

The proceeds of a judgment paid into the county court are not attachable by means of a garnishee summons at the suit of a third person as "a debt," due from the registrar of the court to the judgment debtor.

APPEAL from the county court of Worcestershire holden at Bromsgrove.

1. At a court holden at Bromsgrove on the 9th of January, 1878, Mark Layton recovered against James Chapman a judgment for debt and costs amounting to £11 3s. At the same court George Dolphin recovered a judgment against the same Mark Layton for £16 14s. 6d. debt, and £5 3s. 7d. costs.

2. On the 22d of January, 1878, and before the issuing of the garnishee summons next hereinafter mentioned, Chapman paid the sum of £11 3s. into court into the hands of the registrar, in satisfaction of the judgment against him.

3. On the 22d of February, 1878, Dolphin sued out a garnishee summons against Thomas Scott, the registrar of the court, to recover the £11 3s. paid into his hands by Chapman in satisfaction of Layton's judgment, claiming that sum as money received by Scott to the use of Layton, or as money holden by Scott as trustee for Layton absolutely.

4. Scott, the registrar, appeared and submitted to the judgment of the court; but Mr. Simmons, who had been Layton's solicitor in the proceedings against him, intervened, and claimed the fund in court as assignee of Layton.

5. Simmons, the intervener, made two points,—first, he relied upon his title under the assignment, which, he contended, being prior in date to the garnishee summons against Scott, overrode the title of Dolphin thereunder,—and, secondly, he argued that the proceedings were misconceived, and that a garnishee summons did not lie against Scott, the registrar, who could not be said to be Layton's debtor by reason of the payment of the money into court to Layton's credit.

6. The judge of the county court decided that the alleged  
131] \*assignment to Simmons was void within the statute of Elizabeth (13, c. 5); and no question is to be raised upon that part of his decision.

7. He further decided that, assuming Simmons to have

under the circumstances a *locus standi* to dispute the liability of the registrar to proceedings by garnishee summons, such a summons *did* lie against him, as being *quoad hoc* the banker of Layton ('): \*but upon this point [132

(') The judgment of the county court judge was as follows:

This was a garnishee summons adjourned from the last court, claiming against Mr. Scott, the registrar of the court, a sum of £11 3s. paid into court by one James Chapman in an action at the suit of one Layton, in which judgment was recovered on the 9th of January last. At the same court Dolphin, the plaintiff in these proceedings, recovered a judgment against Layton for £16 14s. 6d. and £5 3s. 7d. costs, and he now seeks to have the funds in the hands of Mr. Scott applied in part satisfaction of this judgment. Mr. Scott shows no cause against the summons, and submits to the order of the court; but the summons was opposed by Mr. Simmons, the debtor Layton's solicitor, who claims under an assignment of Layton's judgment debt alleged to have been made to him last court day. In support of his claim he raised two points,—first, that the proceedings were misconceived, and that no proceedings by way of attachment of the debt lay against Mr. Scott as registrar,—and, secondly, that, if Mr. Scott was liable to proceedings by attachment, his own title as assignee, which accrued prior to the issue of the present summons, overrode that of the judgment creditor, Dolphin.

The first of these two points is one of very general importance; and, although it may be questionable whether it lies in Mr. Simmons's mouth to raise it, I have preferred to consider and decide it, in order to settle,—at least within the ambit of my own circuit,—a point on which, I believe, differences of opinion have prevailed, and on which, so far as I am aware, I can derive no assistance from authority.

It is objected that the registrar would only be liable to proceedings by garnishee summons if he were liable at law to the judgment creditor in an action for money had and received, and that he is not so liable, being a trustee only, or, at most, a mere holder of the money as officer of the court. I do not stop to consider how far the first of these objections is affected

by the fusion of law and equity effected by the Judicature Acts, and how far an equitable debtor may be rendered liable to a judgment creditor of his equitable creditor for the balance which on taking a proper account might appear to be in his hands; because I am of opinion that previously to the Judicature Act the registrar would have been liable at the suit of the judgment creditor (?) to an action for money had and received. The money in his hands *ex equo et bono* belongs to somebody, not himself. To whom, then, does it belong? Not to the execution debtor, surely, who has divested himself of all title to it by paying it into court, not to be holden on his behalf, but in satisfaction of the judgment. Then, does it belong to the execution creditor? It is said that it does not, because there has been no assent by the registrar to hold on his behalf. But I do not agree with this view. By accepting it as paid in absolutely in satisfaction of the debt, with notice of the purpose for which it is intended, viz., for payment to the judgment creditor, the registrar assents to hold it to his credit, and as his banker; and the case is like that of an ordinary banker receiving money to the credit of a customer from a stranger, in which case there is no doubt that the customer could and that the stranger could not sue the banker for improperly detaining the money, in an action for money had and received.

These observations do not, of course, apply to the case where a debtor, disputing the validity of a judgment, pays the debt and costs into court with notice to the registrar not to part with them without the order of the court. By this notice the debtor shows that he retains an interest in the fund, and rebuts the inference which arises from an unconditional payment in satisfaction of the judgment debt. In such a case, if an action were expressly brought against him for money had and received, the court has the remedy in its own hands by staying the proceedings. So far, therefore, as regards the character in which the registrar holds the money, I see no objection to these proceedings.

(which is one of general importance) he gave leave to appeal.

The question for the opinion of the court was: 1. Whether a proceeding by way of garnishee summons could under the circumstances above stated be maintained by Dolphin against Scott.

March 7. *Cyril Dodd*, for the appellant: To warrant a proceeding of this sort, there must be a *debt* due from the garnishee to the debtor, in respect of which the latter might have maintained an action against the former, see 17 & 18 Vict. c. 125, s. 61, which with the other provisions of the Common Law Procedure Acts relating to garnishment is incorporated into the county court jurisdiction by Orders in Council (\*); and see the County Court Orders of 1875, Order xxiv, Rule 3, which shows clearly that there can be no garnishment in the county court except in respect of a *debt* for which the judgment debtor might have sued out a plaint in that court (\*). This is in fact an attempt to attach money in the hands of the court, for which there is no warrant. [He was stopped.]

The plaintiff and the garnishee were not represented.

LORD COLERIDGE, C.J.: I am clearly of opinion that money in the hands of the registrar as an officer of the [133] county court is not \*subject to process of attachment. The appeal must be allowed, with the usual consequences.

DENMAN, J.: I am of the same opinion. I see no distinction in this respect between the registrar of a county court and the masters of one of the superior courts.

*Appeal allowed, with costs.*

Solicitors for appellant: *Pitman & Lane*, for W. E. Simons, Birmingham.

(\*) Poll. C. C. Pr., 8th ed., 211 n.

(\*) See the form of plaint-note, No. 100 of the Schedule of Forms.

See 28 Eng. R., 196 note; High on Receivers, § 151.

As to the liability of a sheriff on an execution, where, before return thereof, the proceeds of the execution are attached in a suit by the defendant in the execution suit against the plaintiff: *Parker v. Bradley*, 46 N. Y. Superior Ct. R., 244.

Judgment debts and moneys collected on execution, by and in the hands of a sheriff, are liable to attachment under process issued in an action against the

judgment creditor. The right so to attach is not affected by the fact that the judgment debtor is also the attaching creditor.

Where property of an attachment debtor is already in the hands of the sheriff, to whom the attachment is issued, no formal notice or levy is necessary to subject it to the lien of the attachment: *Wehle v. Conner*, 83 N. Y., 231, disapproving *Wilder v. Bailey*, 3 Mass., 289, *Pollard v. Ross*, 5 id., 319.



Pellas v. Neptune Marine Insurance Company.

1879

Funds in the official control of receivers and registers in chancery cannot be attached: *Sievers v. Woodburn*, etc., 43 Mich., 275. or administrators are not attachable, unless otherwise specially directed by statute: *Pym v. Morey*, 1 Luzerne Leg. Reg. Rep., 860.

So moneys in the hands of executors .

[4 Common Pleas Division, 189.]

March 18, 1879.

**\*E. PELLAS & CO. V. THE NEPTUNE MARINE INSURANCE COMPANY. [139]**

*Marine Policy—Right of Set-off by Insurers—31 & 32 Vict. c. 86, s. 1.*

In an action by the assignee of a policy of insurance, the insurers are entitled, by virtue of 31 & 32 Vict. c. 86, s. 1, to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured prior to the date of the assignment.

THE plaintiffs are merchants in London. The defendants are an insurance company carrying on business at West Hartlepool, in the county of Durham.

On the 7th of April, 1876, Anthony Harris & Co., of Newcastle, effected a policy of insurance (in the usual form) for £300 on a cargo of coals (and cash advances) shipped on board the ship *Toivatar*, for a voyage from the Tyne to Genoa. The defendants became insurers to Harris & Co. for £300. Harris & Co. were at the time of the making of the policy, and thence up to the date of the agreement hereinafter mentioned, interested in the coals and cash to the amount of all the moneys by them insured thereon, and the policy was made on their account and for their use and benefit.

On the 22d of May, 1876, the policy was assigned by Harris & Co. to M. L. Questa, of Genoa; on the 30th of the same month it was assigned by Questa to Pastorini & Co., of Genoa; and on the 10th of May, 1877, it was assigned by Pastorini & Co. to the plaintiffs,—by virtue of which assignments all the right, title, and interest in the policy passed to the plaintiffs.

The coals were duly shipped on board the *Toivatar* in the Tyne, to be carried to Genoa; and whilst on her voyage, by perils of the sea the goods were lost, and the defendants settled and agreed the loss as a total loss. Against the claim of £300 the defendants, by way of set-off pleaded that “at and previous to the date of the writ (August 24th, 1877) and at the time when the loss in the statement of claim mentioned arose, Harris & Co. were and they still are indebted to the defendants in the amount of £40 0s. 4d. in

1879

Pellas v. Neptune Marine Insurance Company.

respect of moneys due by Harris & Co. to the defendants for premiums on policies other than the policy in the state-  
[40] ment of \*claim mentioned, effected by Harris & Co. with the defendants," and the defendants claimed to set off that sum against an equal amount of the plaintiffs' claim, paying the balance into court.

At the trial before Lord Coleridge, C.J., at the last sittings in London, the plaintiffs relied upon s. 1 of 31 & 32 Vict. c. 86, which enacts that "whenever a policy of insurance on any ship ('), or on any goods in any ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name, and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected," and contended that the words "any defence" were confined to a defence arising on the policy itself, and did not include a set-off or any defence arising *dehors* the policy. On the other hand, it was contended that the object of the enactment was, as its title expresses, to enable the assignee to sue on the policy in his own name, instead as theretofore in the name of the assignor, but not to alter the law in any other respect.

The Lord Chief Justice directed a verdict for the defendants.

Nov. 4, 1878. *Murphy*, Q.C., obtained a rule for a new trial on the ground of misdirection.

Dec. 4. *Herschell*, Q.C., and *A. L. Smith*, showed cause: There is no reason why the plain words of the statute should be limited in the way suggested. If Harris & Co. had sued, this defence would clearly have been open to the defendants. There is no hardship; for the assignees of the policy might have given notice of the assignment.

*Murphy*, Q.C., and *Webster*, Q.C., in support of the rule: The contention of the defendants will entirely frustrate the object the Legislature had in view, which was, to facilitate the remedies of the assignee of a policy, and to prevent the assignor from defeating the assignment by getting credit upon the policy, as he has done here. Contracts are daily  
[41] made for the purchase of cargoes \**"to arrive,"* the value of which materially depends upon whether they are

(<sup>1</sup>) This provision was enacted as to life policies by 30 & 31 Vict. c. 144.

insured or not. It was with a knowledge of the existence of this practice that the act in question was passed. Unless the defence be limited to those which arise on the policy itself, the relief which the Legislature intended to afford to assignees will wholly fail.

[They further contended that the claim here, being for unliquidated damages, could not be the subject of a set-off,—citing *Cumming v. Forester* (1), *Luckie v. Bushby* (2), *King v. Walker* (3), and 1 Arnould on Insurance, 5th ed., 219. This point, however, was not taken at the trial (4).]

*Cur. adv. vult.*

March 18. The judgment of the Court (Denman and Lopes, JJ.,) was delivered by

LOPES, J.: The plaintiffs are merchants, the defendants underwriters. The action is brought on a policy of insurance for £300 effected in January, 1876, by Harris & Co., a firm at Newcastle, on a cargo of coals, and cash advances, shipped on board the *Toivatar* for a voyage from the Tyne to Genoa. The defendants, in consideration of the premium, underwrote the policy and became insurers to Harris & Co.

On the 22d of May, 1876, the policy was assigned by Harris & Co. to one Questa, of Genoa, and on the 30th of May, 1876, the policy was further assigned by Questa to Pastorini & Co., of Genoa, who on the 10th of May, 1877, assigned to the plaintiffs. The *Toivatar* with the coals and cash advances was by the perils insured against, totally lost.

The defendants admitted that the plaintiffs were entitled to recover, and paid the £300 into court, except the sum of £40, which the defendants contended they were entitled to set-off,—the £40, being a debt due to the defendants from Harris & Co., incurred in 1876.

The cause was tried before the Chief Justice of the Common Pleas, in London, who directed a verdict for the defendants. A rule was subsequently obtained for a new trial, for misdirection, \*the ground being that the learned [142 judge ought to have told the jury that the defendants could not set off this £40 against the present plaintiffs.

The question we have to consider on the argument of this rule is, whether, having regard to the provisions of the act 31 & 32 Vict. c. 86, this set-off can be pleaded as a defence against the plaintiffs, who are assignees of the policy. The act is intituled “An act to enable assignees of marine poli-

(1) 1 M. & S., 494.

(2) 13 C. B., 864.

(3) 8 H. & C., 209.

(4) See Order xix, r. 3.

1879

Pellas v. Neptune Marine Insurance Company.

cies to sue thereon in their own names." Sect. 1 is as follows: "Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected."

It is contended on the part of the plaintiffs that "any defence" is confined to a defence arising on the policy itself, and cannot cover or include a defence like a set-off, or in fact any defence which does not arise upon the policy. We are unable to place this limited meaning on the word "defence" used as it is in this act of Parliament. It would be doing violence to the plain language. Previously to the passing of the act, an assignee of a marine policy could not sue in his own name: he must have sued in the name of his assignor. The act was passed to remedy this evil; and, according to our view, the Legislature intended to leave the law in all other respects as it was. It was intended to enable the assignee to sue in his own name; but the defendant was to be entitled to make any defence to the action of the assignee which he might have made to the action of the assignor. Before the act, if this action had been brought, as it must have been, in the name of Harris & Co., the defendants could have set off this £40. If the debt set off had accrued since the assignment, and the defendants had notice of the assignment, it might have been replied as an equitable replication; but the £40 beyond all question could have been set off.

We think the defendants are entitled to set off the £40.

[43] \*A point was taken by the plaintiffs on the argument, which was not raised at the trial. It was, that the plaintiffs' claim was for unliquidated damages, and that the £40 could not be set off against such a claim.

We do not think it necessary to consider this. The point ought to have been taken at the trial. If it had been, the learned judge would probably have amended the statement of defence, by permitting the defendants to add a counterclaim for this £40. If it had been pleaded as a counterclaim, we think it would have come within the words "any defence" in the act. Had the act not been passed, the defendants could only have sued in Harris & Co.'s name. If

Harris & Co. had been plaintiffs, the defendants could under the Judicature Acts have made this £40 the subject of a counter-claim and defence; and we think that it would have been within the meaning of the act of Parliament.

*Rule discharged.*

Solicitors for plaintiffs: *Lowless, Nelson, Jones & Thomas.*

Solicitors for defendants: *Shum, Crossman, Crossman & Pritchard*, for Turnbull & Tilly, West Hartlepool.

[4 Common Pleas Division, 143.]

Feb. 28, 1879.

### FINCH V. BONING.

*Tender—Clerk in Solicitor's Office—Refusal to receive—Implied Authority to receive—Composition on Law Costs.*

Money payable as a composition on a sum due to a solicitor for costs was tendered to a clerk in his office, who, saying that the solicitor was out, and that he, the clerk, had "no instructions," refused the money:

*Held*, per Lord Coleridge, C.J., that the clerk's statement did not amount to a disclaimer of his authority to receive the money; as he was apparently conducting his master's business in the office, such authority might be implied; and, therefore, the tender was good:

Per Denman, J., that the statement was, in effect, a disclaimer of authority; the case was, therefore, indistinguishable from *Bingham v. Allport* (1 Nev. & M., 398), and the tender was bad.

CASE stated for appeal by the judge of the Southwark County Court.

1. This was an action brought by the plaintiff, a solicitor, to recover £15 6s. 10d.; the amount of a bill of costs.

\*2. The defence was a discharge by a resolution of [144 the defendant's creditors, under s. 125 of the Bankruptcy Act, 1879 (32 & 33 Vict. c. 71), and a tender of the amount of the composition on the said debt before action brought, but that the plaintiff had refused to accept the same. The defendant paid into court the amount of the composition.

3. In support of the above defence a witness was called, who stated that he was the accountant engaged by the defendant in the proceedings for liquidation by composition, and that he and the defendant's solicitor (since deceased) went to the offices of the plaintiff, and there tendered the amount of the composition to one of the plaintiff's clerks, who informed him that the plaintiff was out, and that he (the clerk) had received no instructions, and refused to accept the amount tendered.

4. On the part of the plaintiff it was denied that any such

1879

Finch v. Boning.

tender was ever made at all, and witnesses, consisting of the clerks then in the plaintiff's service, were called in support of such denial.

The judge, however, was of opinion that the matters stated in the 3d paragraph were proved, and gave judgment for the defendant with costs.

The question for the opinion of the court was whether the said judgment for the defendant was right, or whether the same should be reversed and entered for the plaintiff, with costs of suit.

*Poulter*, for the plaintiff: The tender was bad. The case is governed by *Bingham v. Allport* (\*), where a tender made at an attorney's office to his clerk, who said that he had no authority from his principal to receive the money or to give a discharge for the debt owing, was held insufficient. In *Wilmott v. Smith* (\*), which may be cited for the defendant, the clerk refused the money because it was not enough. He did not disclaim his authority to receive it. So in *Barrell v. Deere* (\*), where a payment made to a person sitting inside a counting house with account books near him, and who gave a receipt for the principal, was held good. That, however, was a merchant's office.

[145] \* [LORD COLERIDGE, C.J.: The decision is not put on that ground, but on the serious consequences of invalidating payments made in a large place of business to a person apparently intrusted with the conduct of it. In *Moffat v. Parsons* (\*) an argument that tender to a clerk, unless he has express authority, would not be good was met by Mansfield, C.J., saying, "A tender to a managing clerk would suffice."

DENMAN, J.: This tender was at the office where it ought to have been made: *Kirton v. Braithwaite* (\*). The judge seems to have found the tender as a fact.]

The tender to the clerk only.

[LORD COLERIDGE, C.J.: There is an *Anonymous Case* (\*), where money was delivered to a servant, who took it, as was supposed, to her master, and returned, saying he would not receive it; Lord Kenyon, J., "said that in the common transactions of life this kind of intercourse by the intervention of servants must be allowed;" and that there was evidence from which the jury might infer a tender. Is there not evidence of it here?]

No; for the clerk had no instructions. In *Watson v.*

(\*) 1 Nev. & M., 398.

(\*) 1 M. & M., 238.

(\*) 1 M. & M., 200.

(\*) 5 Taunt., 307.

(\*) 1 M. & W., 310.

(\*) 1 Esp., 349, 350

*Hetherington* <sup>(1)</sup> an attorney wrote asking that money should be paid to him; and tender to a writing clerk at his office, who would not, and said he could not, receive it, his master being out, was held bad. Here there was an implied request that the money should be paid to the attorney himself. Surely it cannot be said that tender to any office boy would be valid.

*Melsheimer*, for the defendant: This tender was good. It was made at the proper place to a person who, according to *Barrett v. Deere* <sup>(2)</sup>, had implied authority to receive the money. He did not disclaim that authority, but merely stated that he had "no instructions" about the particular matter. The person who goes to an office to make a tender cannot ascertain the precise functions and the extent of the authority of those he finds conducting the business, and therefore is entitled to rely on the presumption which may be fairly drawn as to their powers to transact business affairs.

\*LORD COLERIDGE, C.J.: I regret that the court is [146 not agreed on this question. I am of opinion that the judgment below was right, and ought to be affirmed. The tender appears to me to have been perfectly good according to the decided cases. I apprehend that the principle is this, viz., that the tender need not be to the principal himself, if the individual to whom the tender is actually made be one who is either, by the course of practice or by direct authority from his principal, authorized to receive the money tendered, or one whom the person who makes the tender has good reason—given by the principal himself—to believe has authority to receive it. Such is the true principle, and the moment the absolute necessity for tender to the individual himself is dispensed with, reasonable evidence that some one who represents him is put in his place may be received. Now, who in an attorney's office does represent him? In *Watson v. Hetherington* <sup>(3)</sup> Parke, B., said that if an attorney asks payment at his office, a tender to any person who is in the office carrying on the business will do, and decided against the tender to an ordinary clerk in an office solely on the ground that the attorney had insisted that the tender should be made to himself. There the defendant's agent went to the office and made a tender, and was told that the attorney was out, yet presented it to a person who he knew was not authorized to receive it. So in *Moffat v. Parsons* <sup>(4)</sup> and *Bingham v. Allport* <sup>(5)</sup> the principle is that

<sup>(1)</sup> 1 C. & K., 36.

<sup>(2)</sup> 1 M. & M., 200.

<sup>(3)</sup> 5 Taunt., 307.

<sup>(4)</sup> 1 Nev. & M., 398.

1879

Finch v. Boning.

when there is a place of business, and a person is conducting that business, a tender made there to that person is as good as if made to the principal himself. There is, no doubt, the qualification, that if at the time of the tender the person to whom it is made distinctly disclaims authority to receive it, the tender is made at the peril of him who makes it, because, should it turn out that the person to whom it was made had no authority to receive the money, the tender will be bad. That is the case of *Bingham v. Allport* (<sup>1</sup>), where the man to whom the tender was made did not say he knew nothing about it, or that he was not the clerk, and the master had spoken to him about it, but said he had no authority from his principal to receive the money. Three [47] judges held the tender bad, and whatever I \*might think of the decision, of which, however, I quite approve, I should be bound by it. But the present case must be taken strictly, because the county court judge finds in favor of the tender on the facts and disbelieves the evidence given against it, and therefore it is to be supported if it can be. He finds that the clerk said he had "no instructions," as I understand, in the particular affair. If this tender be not sufficient, no tender could be made in any great merchant's or solicitor's office in the city of London. For a debtor goes with his money and tenders it to the person carrying on the business, and in ninety-nine cases out of a hundred that person will say that he knows nothing about the matter, and has no instructions. If his statement would invalidate the tender, a good tender could never be made under like circumstances.

Such, however, is not the law nor the principle, and, therefore, although the decision in *Bingham v. Allport* (<sup>1</sup>) might seem to conclude this case, yet when attentively examined it will be found not to do so, and the finding here that the clerk said he had "no instructions" will not suffice. He must have no authority, and the statement that he had no instructions was perfectly compatible with his having authority. I must take it that the county court judge found that the clerk had authority, for he found that there was a good tender. I think the judgment was right.

DENMAN, J.: I am by no means satisfied that my opinion is correct, but I am unable to distinguish the case of *Bingham v. Allport* (<sup>1</sup>) from that before us. The doctrine seems to be that a tender, to be good, must be made to the principal, or to a person having authority to receive the money, and the principle of *Bingham v. Allport* (<sup>1</sup>) is that the clerk,

(<sup>1</sup>) 1 Nev. & M., 398.



who might *prima facie* appear qualified to receive the money, and one to whom a tender might be made, by simply saying that he had no authority, rebutted the presumption that he was authorized. He said he had no authority from his principal to receive the money, and the judge told the jury that if they thought the clerk had disclaimed all authority to receive the money the tender would be insufficient. Here, the clerk said that his master was out, and that he had no instructions. It seems to me to have the same effect as the words "he had no \*authority" in *Bingham v. Allport* (\*). But I am not sorry that my Lord Chief Justice has been able to distinguish that case so as to do justice in this. It is not one where leave should be given to appeal.

*Judgment for the defendant.*

Solicitor for plaintiff: *Finch.*

Solicitors for defendant: *Hoppe & Boyle.*

(<sup>1</sup>) 1 Nev. & M., 398.

---

[4 Common Pleas Division, 148.]

March 6, 7, 1879.

STEVENSON V. WATSON.

*Arbitrator, Position of—Architect—Action against, by Builder for improper Measurement and Estimation of Work—Certificate—Reconsideration of.*

Claim, that the plaintiff contracted with a company to build a hall, the plans, bill of "quantities," &c., for which had been prepared by the defendant who was employed by the company, and named in the contract as their architect to carry out the works. The contract provided that the architect might order additions to or deductions from it, and that the amount of them should be ascertained by the architect in the same manner as the "quantities" had been measured, and at the same rate as they had been priced at; that the contractor and the company would be bound to leave all questions or matters of dispute which might arise during the progress of the works, or in the settlement of the account, to the architect, whose decision should be final and binding upon all parties, and that the contractor would be paid on the certificate of the architect. The claim then alleged that the contract was signed by the plaintiff in the belief and expectation, as the defendant well knew, that the defendant would use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff; that the work was done; that additions and deductions were ordered, and certificates given by the defendant, but that he did not use due care and skill in ascertaining the amounts, and neglected and refused to ascertain them in the same manner as the "quantities" had been measured, and at the same rate, and knowingly or negligently certified for a much less sum than was the net balance payable to the plaintiff, and refused to reconsider his final certificate, by reason whereof the plaintiff was unable to obtain payment from the company of the balance.

On demurrer:

*Held*, that the functions of the architect in ascertaining the amount due to the plaintiff were not merely ministerial, but such as required the exercise of professional judgment, opinion, and skill, and that he, therefore, occupied the position of an arbitrator, against whom, no fraud or collusion being alleged, the action would not lie,

CLAIM: that the plaintiff was a builder in partnership with Field Weston. The defendant was an architect.

149] \*A certain company proposed to build a hall, and employed the defendant as architect to prepare, and he accordingly prepared, plans, drawings, specifications, general conditions of contract, and a bill of the quantities of the works. Thereupon the defendant was employed by the company as architect to carry out the works, and to be the architect under the contract proposed to be entered into by the company with the contractors for the works.

The company advertised for tenders, and directed applications with reference thereto to be made to the defendant, and, after examining the plans, drawings, and specifications, and bills of quantities of the proposed works at the office of the defendant, the plaintiff and one Field Weston tendered for the execution of the works, and their tender was accepted by the company. The defendant requested the plaintiff and Weston to come to his office to execute the contract; and accordingly the plaintiff and Weston signed the contract for the works at the office of the defendant, who witnessed their signature. The contract was made between the plaintiff and Weston of the one part, and the company of the other part, and was as follows:

"The said Richard Stevenson and Field Weston agree to erect and build for the said company . . . the hall according to the drawings, general conditions of contract, and bills of quantities now produced and signed by the parties hereto, and intended to form parts of this agreement, and shall and will finish and complete the hall in such manner, and of such materials, and within such time as is provided by the said general conditions of contract and bills of quantities, and according to the said drawings; and further, that they the said Richard Stevenson and Field Weston will well and truly observe and perform all and every the said conditions and stipulations contained in the said general conditions of contract on the part of the contractors required to be observed and performed, and, in consideration thereof, the said company to pay unto the said Richard Stevenson and Field Weston the sum of £13,560 in the manner set forth in the said general conditions of contract, and in other respects to perform and keep the conditions and stipulations of the said general conditions of contract, so far as the same on their part is or ought to be performed and kept."

150] \*The general conditions of contract referred to in the contract, so far as they were material to this case, were as follows:

"The general conditions of contract for artificers' works required to be done in the erection and completion of a new hall for the Nottingham Temperance Hall Company, Limited, Nottingham, Fothergill Watson, architect, Churton Street, Nottingham, January, 1874." "The architect is at all times to have access to the works, which are to be entirely under his control, and his clerk of the works. The architect may order any additions to or deductions from the contract without in any way vitiating the contract, and the amount of such additions to or deductions from the contract shall be ascertained by the architect in the same manner as the 'quantities' have been measured, and at the same rate as they have been priced at.

"The contractor and the directors will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in the settlement of the account to the architect, whose decisions shall be final and binding upon all parties.

"The contractor will be paid on the certificate of the architect."

The said bill of quantities contained (amongst others) the following stipulations:

"Note.—These quantities will, with drawings and general conditions, form the basis of the contract.

"Should there be more or less measure than is here given, there will respectively be an addition to or a deduction from the contract.

"All measurements to be made in the same manner as the quantities have been taken, and all additions and deductions to be priced out at the same rate by the architect."

The contract was signed by the plaintiff and Weston in the belief and expectation, as the defendant well knew, that the defendant would use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff and Weston under the said contract. Thereupon the plaintiff and Weston proceeded with the execution of the works, and the defendant acted as the architect of the works, and undertook the duties of the architect under the contract.

\*The defendant from time to time during the [151] progress of the works ordered additions to and deductions from the contract.

There were errors in the bill of quantities, and there was, in fact, more measure in certain descriptions of the work than was given in the bill of quantities.

The defendant from time to time during the progress of the works by his certificates certified that certain sums of

1879

Stevenson v. Watson.

money were payable to the plaintiff and Weston in respect of the works executed by them, and gave the same to them, and the said sums, amounting to £10,000, were paid by the company upon the said certificates.

The plaintiff, after the completion of the works, sent to the defendant accounts in respect of the works executed, showing, as the fact was, that, after adding to the contract the amount of the additions ordered by the defendant, and deducting the amount of the deductions ordered by the defendant, and making the stipulated additions in respect of the said errors in the bill of quantities, and giving the company credit for the sum of £10,000 paid by them as aforesaid, there remained a balance of £1,616 6s. 7d. unpaid in respect of the works executed, and for which they were entitled to have the defendant's certificate.

The defendant, without calling upon the plaintiff or Weston for any explanation of the said accounts, and without any communication with them on the subject thereof, made and sent to the plaintiff and to the company his certificate, certifying that the net balance due to the plaintiff over and above the amounts which he had previously certified was £251 14s. 4d.

Par. 17. The defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff under the said contracts, but, in ascertaining the net balance due to the plaintiff, neglected and refused to ascertain, and did not ascertain, the amount of the said additions to and deductions from the contract in the same manner as the quantities had been measured, and at the same rate as they had been priced out, or that there was more measure in the said description of works than was given in the bill of quantities, by making measurements in the same manner as the quantities had been taken, and neglected and refused to price out, and did not price out, the excess at [52] the same \*rate, and make the stipulated addition to the contract in respect thereof according to the terms of the contract, nor did he use due care and skill to ascertain in the manner provided by the contract what was in fact the net balance payable to the plaintiff by the company, in respect of the works executed for which the defendant was entitled to his certificate, but the defendant knowingly or negligently certified as aforesaid for a much less sum than was in fact the net balance payable to the plaintiff in respect of the works executed.

Par. 18. Upon the receipt of the said certificate, the plaintiff requested the defendant to inform him of the data upon

which the same was based, but he refused to furnish the plaintiff with them, or to give him any information on the subject. The plaintiff thereupon requested the defendant to reconsider the said certificate, and offered to point out to him the said errors in the bill of quantities, and to give him any explanation he might require of the said accounts, but the defendant refused to reconsider the said certificate, and to allow the plaintiff to point out to him the said errors in the bill of quantities, or to explain the said accounts, or to hear any objection whatever on the part of the plaintiff to the said certificate.

By reason of the premises the plaintiff was unable to obtain payment from the company of the balance, and had been deprived of and had wholly lost the same and the use thereof from the time when he was entitled to the certificate of the defendant for the amount thereof.

After the making of the contract the plaintiff and Weston dissolved partnership, and the causes of action became and were vested in the plaintiff alone.

The plaintiff claimed damages £1,364 12s. 3d. and interest.

Defence: Demurrer on the ground that the statement of claim showed that the defendant was in the position of an arbitrator, and that he acted, and declared his decision, and the claim did not allege fraud or *mala fides*, and, therefore, showed no cause of action, and on other grounds sufficient to sustain the demurrer.

*Wills*, Q.C. (*Graham*, with him), for the defendant: The claim is bad. The action is brought against a person in the position \*of a quasi-arbitrator, and therefore will not [153 lie: *Pappa v. Rose* ('). There, the quality of raisins sold was left to the opinion of the selling broker. This court and that of the Exchequer Chamber held that he was a sort of arbitrator, and, consequently, was not liable for failing to exercise reasonable care and skill in coming to a decision as to the quality of the fruit, he having acted *bona fide* and to the best of his judgment. So likewise an average adjuster, to whom the owners of a ship and the owners of its cargo referred a question as to the proportion of a loss to be borne by each, has been held to be in the nature of an arbitrator: *Tharsis Sulphur and Copper Company, Limited, v. Loftus* ('). An arbitrator is under no legal duty to use either care or skill.

[LORD COLERIDGE, C.J.: The position of the architect is peculiar, and is different from that of an average stater or

(<sup>1</sup>) Law Rep., 7 C. P., 32, 525; 3 Eng. Rep., 375, affirming 1 Eng. R., 87.

(<sup>2</sup>) Law Rep., 8 C. P., 1; 4 Eng. Rep., 282.

1879

Stevenson v. Watson.

fruit broker. The architect has an interest in reducing the builder's bill.]

So had the engineer of the defendants' company in *Ranger v. Great Western Ry. Co.* (\*), but the House of Lords held that the plaintiff contractor, who had bound himself to submit to the decision of the engineer, could not complain of his decision. In *Scott v. Corporation of Liverpool* (†), the contractor filed a bill against his employers and their engineer complaining of undue delay by the latter in awarding the amount earned by the contractor, and sought payment of what was due upon the contract, but did not establish any case of fraud or collusion against the engineer. The bill was dismissed with costs. It is against public policy to allow this action. There is no precedent for it. If it could be maintained attempts would be constantly made to disturb the decisions of those chosen by the parties to fix sums payable. The claim alleges a duty in the architect towards the builder which must be based on some implied contract. But there is none.

[DENMAN, J.: There is a duty to be honest. Suppose clear proof were given of a conspiracy between the architect and his employer to defraud the builder?]

Fraud is not alleged in the present case.

[LORD COLERIDGE, C.J.: What if the architect has not in a fair sense of the word decided at all?]

154] \*He has certified from time to time, and finally. The last certificate being given the architect was *functus officio*, and was therefore right to decline to give another.

*Cave*, Q.C., for the plaintiff: The architect was not an arbitrator or quasi-arbitrator; but if he was, then he has been guilty of misconduct, for which the action will lie.

First, his duty was simply that of "measuring up" the work, to ascertain the amount of the additions to or deductions from the contract. This duty was merely ministerial, and such as he might delegate. He, no doubt, did delegate it to a clerk. The plaintiff entered into the contract on the faith that the architect would act upon the terms of it, and measure up according to the prescribed mode. It was to the advantage of the architect that the builder should undertake to carry out his plans, and therefore there was consideration moving from the plaintiff to the defendant for an agreement by the defendant to measure up the work according to the terms of the contract. If asked whether he would undertake to use care and skill when measuring up, he would of course have answered in the affirmative.

(\*) 5 H. L. C., 72.

(†) 4 De G. & J., 334.

Whereas an arbitrator does not undertake to use either care or skill, but only to be impartial. Valuation is not arbitration. For instance, an appraisement of hay and repairs which is made for the outgoing or incoming tenants of a farm by valuers between them, need not be stamped as an award: *Leeds v. Burrows* (\*). The courts have indeed somewhat extended the doctrine that protects arbitrators, to quasi-arbitrators, as in *Pappa v. Rose* (\*). There, however, the broker undertook to give his opinion upon the fruit submitted to him. Moreover, a dispute had arisen. But the function of a mere valuer is not judicial, nor does it become so because two parties employ the same person to value the subject-matter of a contract between them. The architect here was appointed and employed by both parties. Possibly if he had not acted at all, the plaintiff could not have sued him for refusing to do so; but having accepted and entered upon his duties he undertook to measure the work in the manner specified in the contract, and to bring care, skill, and professional knowledge to the performance \*of his duty: *Story v. Richardson* (\*); *Jenkins v. Betham* (\*). He is liable for a breach of that undertaking.

Secondly, even assuming that he was a quasi-arbitrator, "he was bound to exercise his judgment impartially between the contracting parties." See per Blackburn, J., *Pappa v. Rose* (\*). It cannot be said that he might even be dishonest with impunity.

A building owner who colludes with the architect to deprive the builder of a certificate is liable to an action: *Batterbury v. Vyse* (\*). And in *Ludbrook v. Barrett* (\*) Grove, J., held, on demurrer, that an action would lie by a builder against an architect who fraudulently, and in collusion with the builder's employer, refused to certify, if the architect had an interest in the building contract. Where there is such collusion, there is abundant authority to show that the action can be maintained. See per Erle, C.J., *Clarke v. Watson* (\*). The claim alleges that the defendant "knowingly or negligently" certified for a much less sum than was in fact payable. If he "knowingly" did so it was a wilful act, whereby the plaintiff was injured. Moreover, a claim may now be made, as this is, in the alternative. So if the architect either wilfully or negligently mismeasured

(\*) 12 East, 1.

(\*) Law Rep., 7 C. P., 32, 525; 3 Eng. R., 375, affirming 1 Eng. R., 87.

(\*) 6 Bing. N. C., 123.

(\*) 15 C. B., 168.

(\*) Law Rep., 7 C. P., 528; 3 Eng. R., 375, affirming 1 Eng. R., 87.

(\*) 2 H. &amp; C., 42; 32 L. J. (Ex.), 177.

(\*) 36 L. T. (N.S.), 616.

(\*) 34 L. J. (C.P.), 148, p. 150.

the work the action lies. The plaintiff would be left without remedy if he cannot sue the architect, for his certificate cannot be set aside and another valuer appointed, as this is not an arbitration within the terms of the Common Law Procedure Act (17 & 18 Vict. c. 125, s. 12): *Collins v. Collins* (<sup>1</sup>). Romilly, M.R., said in that case, "An arbitration is a reference to the decision of one or more persons . . . of some matter or matters in difference between the parties" (<sup>2</sup>). A valuation precludes differences, it does not settle those which have arisen. No dispute has arisen here, no judgment nor opinion has been given.

It was misconduct to refuse to hear the plaintiff, and to reconsider the certificate. The defendant has, in effect, not adjudicated at all. *Ex parte* proceedings before an arbitrator invalidate his award.

156] \* *Wills*, Q.C., in reply: The builder contracts with his employer on the terms that he shall appoint his own architect to watch over his interests; and that the architect's decision shall be final. He has to decide what are extras, and "measuring up" requires the exercise of professional judgment. This appears from the contract and bill of quantities which may be referred to as part of the claim. His certificate is a condition precedent to the contractor's obtaining payment. The architect is employed and paid by the building owner only, and makes no contract either express or implied with the builder.

The plaintiff has neither alleged nor suggested fraud or collusion by the defendant, and it cannot be inferred from the use in the claim of the word "knowingly," which means that he knew what figures he put down and their result, and did not make his calculations by accident or mistake.

LORD COLERIDGE, C.J.: This is, no doubt, in some sense an action of first impression. If the true view of the case were only as Mr. Cave suggests, viz., that the plaintiff had undertaken to perform certain work under a contract made with a third person, to which the defendant was in terms no party, but that he was aware of and had acted under the contract which had imposed on him the duty of doing certain work requiring no judgment, no opinion, and requiring only the exercise of what I may call ordinary arithmetical powers, and the performance of his duty under that contract was necessary to the plaintiff's right to recover, yet the defendant had refused that duty, then I think the action would lie. But I am not aware that this form of action has

(<sup>1</sup>) 26 Beav., 306.

(<sup>2</sup>) 26 Beav., at p. 312.



ever been maintained. It is certain that in none of the cases cited the supposed duty was of the kind I have described, or the breach of duty was of the sort I have intimated. So as far as I know the action would be a fresh action unconcluded by authority, and for the maintenance of which there would be, in my judgment, very good grounds both in sense and law. But I am of opinion that is not the case before us. This claim is for that which has been over and over again attempted without success. It is an action against a man for the negligent performance of a duty, in the doing of which the exercise of judgment or opinion is necessary. \*Such being the true view of the claim, [157 the cases on that point apply and bind us. Speaking for myself I entirely approve of them, and think them sound and right.

The action is by a contractor—not against his employer but—against the architect of the building owner and, if you please, the architect of the contractor himself, under a contract, the material parts of which are sufficiently set out in the claim. [His Lordship read them.] The work appears to have been done, and during the performance of it the defendant ordered additions to and deductions from the contract. The plaintiff states there were errors in the bill of quantities, and that there was more “measure” in certain descriptions of work than given in the bill of quantities. That means, I suppose, that under the bill of quantities he had to do more work than he thought he should have to do. It is then alleged that the plaintiff was paid certain sums of money, and that he after the completion of the works sent—not to the building owner but—to the defendant accounts showing a balance for which he was entitled to have the defendant’s certificate; that the defendant, without calling on the plaintiff for an explanation or communicating with him, made and sent to the plaintiff and to the company a certificate for a net balance of £251 14s. 4d. only. On these facts the plaintiff states his cause of action. [His Lordship read it.] Now it is said that the statement of action is of this limited kind; that the only duty cast on the defendant was a purely ministerial and clerkly duty; that he had to make certain arithmetical calculations; and that, if they had been properly made, £1,600 was due to the plaintiff; that he did not make and would not make those calculations which were purely arithmetical and called for the exercise of no judgment and demanded no exercise of opinion at all; and that for not doing this purely ministerial duty, inasmuch as it damaged the

1879

Stevenson v. Watson.

plaintiff to the amount of £1,364, the action lies. If, as I have already said, that were the true construction—and these paragraphs put the true construction on the contract—I should have been, as at present advised, of opinion that the action would lie, and I say so assuming the right view of the words “knowingly or negligently” to be that presented to us in the able argument of Mr. Wills, viz., that “knowingly” does not necessarily mean and must not be [58] \*taken to mean fraudulently. It is capable of a milder interpretation, viz., that knowing a particular mode of calculation would bring out a certain result the defendant brought out another, and therefore it was wrong to his knowledge or within his means of knowledge. But when regard is had to the contract, and to the duty to be performed under it, it will be seen plainly that the duty is not merely ministerial or clerkly, and, looking at the contract itself, and the bill of quantities according to which the deductions or additions are to be calculated, it is manifest at a glance that in order to arrive at the amount of additions or deductions a great deal more than arithmetical calculation is necessary. The quality of the work, and the extent to which particular deductions or additions came within particular heads of the bill of quantities, are questions perfectly fit for the determination of an architect, and in many cases it would be necessary, and, probably, in all cases actually required that there should be an exercise of considerable professional judgment and skill, and that before the arithmetical result of so many feet of work and so many pounds and shillings for the work could be arrived at, there must be knowledge of the work, familiarity with the bills of quantities, professional understanding to comprehend the technical terms, and judgment to say under which head the deductions or additions ought to be placed. I think, therefore, it is plain when the documents which I am told we must treat as part of the claim are looked at, that although, no doubt, the result is one of figures, yet before it can be arrived at, there must be an exercise of professional knowledge, skill, and judgment. Moreover, it seems to me that it is so provided for by the contract, and that the true view of the contract is that presented by Mr. Wills, viz., that before the plaintiff can recover the sums of money from the building owner, there must be the certificate of the architect to ascertain what sums are due from the building owner to the plaintiff. Now if I have rightly described the position of the defendant with respect to the plaintiff, it follows from the decided cases that this action does not lie.

Where indeed the building owner and the architect collude together, and in collusion the architect fraudulently abstains from doing his duty towards the builder, there is the authority for saying that he can maintain an action against \*the building owner, *Batterbury v. Vyse*(<sup>1</sup>); or the [159 architect, *Ludbrook v. Barrett*(<sup>2</sup>). It must be left to the Court of Appeal to overrule those cases if they are wrong. They are directly in point, and seem to me founded on clearest sense and justice; but they are not this case, because here neither fraud nor collusion are suggested, unless fraud and *mala fides* be suggested by the word "knowingly," which, for reasons already given, I do not think can be, nor does Mr. Cave go so far as to say so. I think this case is within the authority of the cases cited which decide that where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position when such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised.

I will not discuss the principles on which they rest; it is enough to say that in those judgments pronounced by courts of co-ordinate jurisdiction, and also in the Exchequer Chamber, I entirely concur, not only on authority, but on grounds of reason and sense.

Therefore, it seems to me that the first part of the claim is disposed of, and the demurrer must be allowed so far as it applies to par. 17. It remains only to consider par. 18. I think that what is therein stated is no ground of action at all. There, again, *mala fides* and collusion are not even suggested. It alleges simply that the architect, who is by the contract to form an opinion, and who has formed an opinion, and expressed it, declines to say on what he grounded it, and to hear argument offered to show that the opinion was wrongly formed. I think if his position be such as I have described, he is not bound to give the grounds of his opinion, or to reconsider it, and that the person who has taken him for better and for worse (not as architect, for that is the wrong ground to put the case on, but) as one whose opinion is a condition precedent to the obtaining of a sum of money, cannot bring an action against him for refusing to give the ground of his opinion, or to hear evidence tendered to show that the opinion was wrong. \*I think that is the [160

(<sup>1</sup>) 2 H. & C., 42.

(<sup>2</sup>) 36 L. T. (N.S.), 616.

better ground to put it on, because I at first thought he might on a certain view of the facts be regarded as an arbitrator who had not arbitrated, and that perhaps an action might be maintained (according to obvious analogies), not for doing his duty ill, but for not doing it under any circumstances. But those cases have only been where there has been a dispute between the plaintiff and the building owner, and I doubt whether here any such dispute has arisen. So, assuming that I am right in my supposition that he is made arbitrator between the parties, and on declining to arbitrate could be forced to take upon himself the duty of deciding after reasonable inquiry, I do not think that arises here, for no kind of dispute on the facts before us has arisen.

The demurrer must be allowed.

DENMAN, J.: I am of the same opinion. The plaintiff, who is a builder, entered into a contract with the company to erect a large building; and the defendant is the architect who was named in the contract, as the person appointed and agreed upon by them to do certain acts without which the plaintiff would not be entitled to the money for his work. There is no direct contract between the plaintiff and the defendant. The defendant does not sign it, and is not made a party by being mentioned in it, except for the purpose for which he was mentioned. But it is contended that he is bound by that contract so as to be liable, either as a person who has contracted to do certain things which he has neglected, or that by virtue of his office he owed a duty to the plaintiff which he has neglected. I am not prepared to say that it is impossible to conceive a case in which he might not be liable on the contract itself, knowing that he is named in it, and accepting the duties under it, and receiving certain benefits out of it, as in every case where an architect is employed. A case is conceivable where, by acting under a contract, he might become so far a party as to be liable either under the contract, or in respect of rights and duties arising by reason of the office assumed which would give a right of action to either party. But supposing a duty does arise, the question is, what is the amount of the duty? It appears to me that he does not, by undertaking the office of arbitrator, [161] undertake any duty amounting to more than that of honestly performing his functions.

Suppose the case alleged that the defendant, having undertaken the office of architect and arbitrator between the building owner and the contractor, fraudulently or corruptly, or in collusion with the building owner, dishonestly

took a course which he ought not to have taken, and so injured the plaintiff, I have, as at present advised, no doubt whatever that an action might have lain against him. There are many dicta to that effect. But the question is, what duty did he here undertake? That depends on the nature of the employment of an architect who acts under a contract of this kind. I do not intend to hold that he is to all intents and purposes an arbitrator, but I think that his duties are very analogous to the duties of an arbitrator, and are quite as much so as were those of the defendant in *Pappa v. Rose* (1) or *Tharsis Sulphur and Copper Company, Limited, v. Loftus* (2). The argument of Mr. Cave is that under the present contract the architect was not an arbitrator or a person appointed by the parties to decide questions requiring exercise of discretion, skill, or, in one sense, judgment at all, but was a kind of appraiser or valuer, to look at certain work, cast up certain figures, and do rather clerkly than judicial work, or the work of an arbitrator, which requires the exercise of skill and judgment. So to hold would be to ignore the experience of every member of the bar and bench who has had to do with building contracts, and as very many of us have had great experience of them we ought to take it into consideration. We know that it frequently happens in references that there will be skilled architects called on one side and on the other who very often honestly differ as to the proper mode of measuring up, and disagree to the extent of hundreds of pounds as to what is owing under a bill of quantities. This appears to me enough to show that an architect is not to be dealt with as a mere caster up of figures, who, if he makes a mistake, is to be looked upon as guilty of negligence because he has cast them up wrongly, but as one having to do something requiring judgment, discretion, and skill, and I think that he is a \*person exercising very important functions requiring skill and judgment in cases of this kind. That being so, *Pappa v. Rose* (1) and *Tharsis Sulphur Company v. Loftus* (2) apply. The only distinction pointed out by Mr. Cave was that in one case an actual dispute had arisen, and therefore the defendant was an arbitrator, whereas he might not be so before a dispute. But it seems to me that the architect is an arbitrator from the beginning to the end of the contract, he is throughout to have his eye on the work, and give certificates from time to time, all having reference to his final certificate, and, unless he gave the duty up altogether from the

(1) Law Rep., 7 C. P., 32, 525; 3 Eng. R., 375, affirming 1 Eng. R., 87.

(2) Law Rep., 8 C. P., 1.

first appointment, he is from the first a person exercising judgment on a matter on which the parties cannot exercise judgment.

I think, therefore, that the parties have trusted to him, and that from the beginning he must exercise his functions fairly and honestly between them, and that if he violates that duty he is liable to an action. If he honestly performs them then he honestly performs his bargain, if it be a bargain, or his duty, if it be a duty, arising from the acceptance of the functions, and the parties must abide by it. But it is said that paragraph 17 carries the case further, because it alleges that the defendant "knowingly or negligently" certified for a much less sum than was in fact due. It would, I think, be a bad precedent were we to hold that by cramming into the claim such a word as that it could be expanded into meaning "fraudulently, dishonestly, and corruptly," charges quite different from what was here intended. But I think that word "knowingly" equivalent to "knowing the figures put down." It would have been easy, if necessary, to use the words "fraudulently and corruptly." Paragraph 18 remains to be considered. The answer to the contention in it appears to me to be that the defendant would have done very wrong if he had, at the mere request of the plaintiff, and without any dispute having arisen between the parties, but on the complaint of the plaintiff alone, reopened the matter and determined to reconsider his certificate. No dispute had arisen between the parties. The only dispute which had arisen was between [163] him and the builder, and all that \*appears was that the builder was dissatisfied with the certificate. I think that claim, also, is ill founded, and that our judgment should be for the defendant.

*Judgment for the defendant.*

Solicitors for plaintiff: *Field, Roscoe & Co.*

Solicitors for defendant: *Taylor, Hoare & Taylor.*

See 28 Eng. Rep., 203 note.

Where a policy of insurance provides for an arbitration to determine the amount of loss in case differences arise touching the same, "and upon the written request of either party," and also that no suit shall be sustainable until after an award shall have been obtained in the manner above provided: held, that the defence that plaintiff has refused to arbitrate cannot be made where neither party has made

a written request for such arbitration: and held, further, it makes no difference that one party or the other has refused to arbitrate upon a verbal request to do so, or may have refused to make such request in writing: *Wallace v. German, etc.*, 1 McCrary, 335, Dist. Iowa.

Where a contract provides that any dispute touching the quantity, quality, or value of work should be referred to an arbiter, whose decision should be

final, the contractor cannot maintain an action for the price, unless he shows that the dispute has been so referred or that he had offered so to do: *Harbupée v. Pittsburg*, 97 Penn. St. R., 108.

Where the certificate of an architect is to be final, in the absence of fraud or mistake, it is conclusive: *Weeks v. Little*, 47 N. Y. Super. Ct. R., 1.

The plaintiffs alleged that they purchased a quantity of molasses from defendants, under the agreement that the quantity was to be determined by the Saint John gauge (which had already been made), providing that the gauging had been done correctly according to the Saint John system. The defendants, on the other hand, alleged that the agreement was that the quantity was to be ascertained by the gauge inscribed upon the casks by the Saint John gauger, whether the same was more or less than the correct quantity. The evidence on this point was contradictory. The rod with which the Saint John gauger had gauged the molasses was too short, and had, without his knowledge, been tampered with, and the actual quantity of molasses was considerably less than what the plaintiffs paid for, and the plaintiffs brought this action to recover the amount so overpaid. The judge left the questions to the jury in the following manner: Did the plaintiffs purchase on the Saint John gauge as inscribed on the casks; and was the bargain that such inscribed gauge should be taken as the correct quantity, whether the same showed more or less than the correct quantities? If so, inasmuch as both parties apparently acted on the *bona fide* belief that the gauging had been done correctly in the ordinary way, the plaintiffs would be precluded from opening up the matter and claiming for any deficiency. Secondly: If such was not the bargain, was it that plaintiffs should accept the molasses by the Saint John gauge made in the ordinary way? If so, then if the gauge had been regularly done by the Saint John gauger with a lawful instrument, and the quantities should not be satisfactory to the purchasers, they would notwithstanding be barred by the measurement, and could not recover for any deficiency. But if the gauging was not done with a lawful instrument, but with a rod of imperfect dimensions, it

would not be a gauging by the Saint John system; in fact it amounted to no gauging at all, and the gauging upon which the defendants sold had not taken place, and the plaintiffs would be entitled to recover back any money overpaid on account of such short delivery. Held, on motion for a new trial, that this direction was correct.

S., a gauger at St. John, sent defendants a certificate of quantity of molasses contained in a number of casks by them sold to the plaintiffs, as ascertained by a re-gauging. This certificate he afterwards saw in defendant's possession and conversed with one of them about it. The conversation between S. and the defendant having been received in evidence, the certificate was offered in evidence and received, subject to objection.

Held, that as the conversation was admissible, the certificate, concerning which they were conversing, was also admissible: *Cox v. McMauér*, 3 Pugsley & Burbidge, 121.

A stipulation in a contract for arbitration in case of dispute as to the true value of extra work or of work omitted, ousts a court of law or of equity of all jurisdiction over the matter falling within the stipulation.

Disputes as to whether certain work was extra work or not, and as to whether extra work done at agreed prices was properly done or not, do not fall within the stipulation: *Weeks v. Little*, 47 N. Y. Super. Ct. R., 1.

Held, that a covenant in a contract for the construction of railway works, between the chief contractor and a sub-contractor, that the qualities and quantities of the work done by the sub-contractor should be ascertained and determined before an engineer to be named by the contractor-in-chief, is a valid covenant.

That under the pleadings in this case the defendant was entitled to the benefit of the said covenant.

That the defendant could not have the said covenant as regards works done by the sub-contractor, not alleged by either of the parties to have been done under the contract, although alleged and proved to have been done in connection with and whilst the works contracted for were in progress: *Savard v. McGreevy*, 7 Quebec L. R., 97.

J. T. and J. M., arbitrators, being

1879

Berringer v. Great Eastern Railway Co.

agreed that a certain sum was due by the defendant, but differing as to the parties by whom the action could be legally brought, by a memorandum indorsed upon the submissions appointed by J. W. R. as umpire. The latter having heard from the arbitrators the statement of facts in which they both concurred, decided that the plaintiffs were the proper parties, and so awarded in conjunction with the arbitrator with whom he agreed.

The defendant took exception to the award, on the grounds, 1st, that he had not acquiesced in the appointment of

the umpire; 2d, that the umpire had not himself heard the evidence of the parties; and 3d, that the defendant had no notice of the appointment or of opportunity of producing testimony.

After argument the case was referred back to the umpire with instructions to cite the parties before him, to enable them to be heard with their witnesses.

Sir W. Young, C.J., while consenting to the cause being referred back, was of opinion that the award was sustainable, and that the rule for setting it aside should be discharged: *Eaton v. Campbell*, 2 Nova Scotia Dec., 314.

[4 Common Pleas Division, 163.]

March 11, 1879.

## BERRINGER V. THE GREAT EASTERN RAILWAY COMPANY.

*Master and Servant—Action by Master for Injury to Servant—Pure Tort—Railways.*

Claim alleged that the servant of the plaintiff took a ticket and travelled by the L. T. & S. Railway; that the defendants, the Great Eastern Railway Company, supplied the engines, drivers and firemen for working the traffic of the L. T. & S. Railway, and also the signalmen for working the said traffic at the S. Junction; that the L. T. & S. train in which the servant travelled came into collision with a train of the defendant company at the junction, through the negligence of the defendants' signalman there; that the servant was hurt, whereby the plaintiff lost his services and was damaged. On demurrer:

*Held*, that the action was against independent wrongdoers, not parties to the contract of carriage, for a pure tort, and could therefore be maintained.

**CLAIM:** That the plaintiff John Berringer carried on the business of a butcher, and was the father of the plaintiff, Frederick Berringer, who was an infant <sup>(1)</sup>.

The London, Tilbury and Southend Railway Company were carriers of passengers for hire between Fenchurch Street and Southend, and the defendant company were carriers of passengers for hire between Fenchurch Street and Woolwich. The defendant company supplied the engines, drivers and firemen for working the traffic of the London, Tilbury and Southend Company's line, and also the signalmen for working the said traffic at Stepney Junction.

The plaintiff Frederick took a ticket at Fenchurch Street station, by a train leaving there at a certain hour upon the London, Tilbury and Southend Company's line to South-  
[164] end, and proceeded \*as far as Stepney Junction, when the said train came violently into collision with a train be-

<sup>(1)</sup> The infant sued, by his father as his next friend, for the personal injuries he had sustained.



longing to the defendant company proceeding from Woolwich to Fenchurch Street, and the plaintiff Frederick was thereby injured. The collision was caused through the negligence of the defendants' servants, partly owing to the defective construction and working of the defendants' down home main line signal arm at Stepney Junction, in that it would not show the "Danger" signal when it was so required, and partly owing to the fact that the defendant company's signalman at the said junction so negligently and improperly shifted certain points there, as to turn the down-train in which the plaintiff Frederick was travelling across the road of an up-train belonging to the defendant company, then leaving Stepney Junction for Fenchurch Street, whereby the former train ran into the latter and the collision occurred.

Par. 5. Prior to the 5th of August, 1878, the plaintiff Frederick was in the habit of assisting the plaintiff John Berringer in his business. Since that date he had been utterly unable to render his father any assistance, whereby the plaintiff John Berringer had lost his son's services and had been put to expense.

Demurrer to so much of the claim as supported the alleged claim of the plaintiff John Berringer mentioned in the 5th paragraph thereof, on the ground that the facts therein alleged showed no contract between the plaintiff John Berringer and the defendants or the London, Tilbury and Southend Railway Company to carry the plaintiff Frederick Berringer.

*Nicoll*, for the defendants: The claim by the father to recover for the loss of services of the son, who is his servant, is bad. There was no contract between the father and the defendant, and the breach of duty shown in the claim arises out of contract. But the son took the ticket, and any damage sustained was from a breach of the contract with him. "It must be admitted by the defendants that a long series of authorities has established that a master may sue for loss of services caused by a pure wrong, a trespass, to his servant, as, by beating him. On the other hand, it is indisputable that no such action has ever been sustained in a case in which the injury to the servant was not actionable in respect of the civil wrong, but only [165 in respect of a duty arising out of and founded upon a contract with the servant:" per Willes, J., *Alton v. Midland Ry. Co.* (').

[*Reginald Brown*, for the plaintiff: Were this action

(') 19 C. B. (N.S.), 213, at p. 239; 34 L. J. (C.P.), 292, at p. 297.

1879

Imperial Marine Insurance Co. v. Fire Insurance Corporation.

against the carrying railway company that case would, no doubt, be conclusive; but the plaintiff has taken care to sue the defendant company for a mere trespass, by causing a collision between their train and that in which his servant was carried.]

The defendants are connected with the Tilbury Company, and have, by pleading to the claim, accepted their responsibility. No trespass is alleged or shown, but negligence in performing the contract of carriage. If the claim were for a pure tort the plaintiff would not have alleged that the defendants supplied the engines, drivers and firemen for working the traffic of the Tilbury line. It is a tort founded on contract: see *Martin v. Great Northern Ry. Co.* (').

"The form of the action cannot alter the nature of the transaction; the form of the transaction is originally contract;" per Mansfield, C.J.: *Powell v. Layton* ('). There was no privity of contract between the plaintiff and the defendants: *Winterbottom v. Wright* (').

LOPES, J.: I need not trouble Mr. Brown to argue, for I think the claim is valid. The claim is against the company not parties to the contract of carriage, for a pure tort, such as would be committed if a vehicle in the highway were wrongfully driven against or across the path of another vehicle, whereby a servant therein was hurt, and his master lost his services.

*Demurrer overruled.*

Solicitors for plaintiff: *Gush & Phillips.*

Solicitor for defendants: *Capel A. Curwood.*

(') 16 C. B., 179.

(') 2 B. & P., 365, at p. 370.

(') 10 M. & W., 109.

[4 Common Pleas Division, 166.]

March 12, 1879.

**166] \*THE IMPERIAL MARINE INSURANCE COMPANY V. THE FIRE INSURANCE CORPORATION, Limited.**

*Ship and Shipping—Marine Insurance—Reinsurance against Fire—Successive open Policies—Usage of Underwriters—Declarations of Risk—Order of—Rectification of—Negligence in declaring.*

The defendants, a fire insurance corporation, agreed to reinsure the plaintiffs, a marine insurance company, against loss by fire up to £1,000 by any one vessel upon all coal-laden ships insured by the plaintiffs at and from certain ports to others. A policy was accordingly subscribed by the defendants whereby in consideration of £250 they undertook to reinsure the plaintiffs against loss or damage by fire to the extent of £50,000 by the ships as might be declared at and from certain ports to others, the policy to be subject to the same clauses and conditions (as

---

Imperial Marine Insurance Co. v. Fire Insurance Corporation.

---

far as they related to fire risk only) as the original policy or policies, and would pay as might be paid thereon. The policy provided that the arrangement was to be in force for a year, and include only coal-laden vessels, and the policy was to be supplemented by further policies on like terms should the amount of it not prove sufficient for the year's transactions. This and a second policy being exhausted by declarations of risk made under them, a third policy was applied for by the plaintiffs and issued to them. A risk, incurred prior to the date of the second policy, was not included in those declarations and was followed by a loss of cargo from fire known to the plaintiffs when the third policy issued, but, through mere neglect on the part of their manager, was not declared until afterwards. Taken in chronological order, this risk came under the third policy, if any.

In an action to recover for the loss, the court, empowered to decide all questions in the case:

*Held*, that although the defendants had reinsured against fire only, their agreement was in respect of a marine risk and subject to the usage of underwriters stated in *Stephens v. Australasian Insurance Company* (4 Eng. R., 296), and that, therefore, the policies attached to the goods in order of shipment, and the declarations must be rectified to make them correspond with it, and this might be done even after loss; that the negligence of the plaintiffs' manager did not deprive them of their right to do it, and consequently that they were entitled to recover.

**FURTHER CONSIDERATION.** The nature of the action and the facts and admissions in it were thus stated in the judgment of the court:

This case came before Mr. Justice Lopes for trial last Summer Liverpool Assizes. The jury were discharged by consent without a verdict, and all questions were left to his decision.

The plaintiffs are a marine insurance company carrying on \*business at Liverpool, and the defendants are a [167 fire insurance corporation.

In November, 1876, it was agreed between the plaintiffs and defendants that the defendants should, upon certain agreed terms, reinsure the plaintiffs against loss by fire to the extent of not more than £1,000 by any one vessel upon all coal-laden ships, which should be insured by the plaintiffs under their policies at and from certain agreed ports to certain other agreed ports.

In accordance with such agreement the defendants subscribed and issued to the plaintiffs a policy dated the 28th of February, 1877, whereby the defendants in consideration of £250 undertook to guarantee or reinsure the plaintiffs against loss or damage by fire and the consequence thereof to the extent of £50,000 by the ships or vessels as might be declared at and from certain ports therein mentioned to destination, the said policy to be subject to the same clauses and conditions (as far as they related to the fire risk only) as the original policy or policies, and would pay as might be paid thereon. In the said policy it was provided that the arrangement was to be in force for one year from the 1st of October, 1876, and was to include only such vessels as

1879 Imperial Marine Insurance Co. v. Fire Insurance Corporation.

were coal-laden. It was also provided that the said policy was to be supplemented by further policies on like terms should the amount thereof not prove sufficient for the year's transactions.

Declarations were made on the 19th of February and on the 29th of June, such declarations were far in excess of the policy. On the 9th of July defendants subscribed and issued a second policy for £50,000 similar in terms in every respect to the former policy.

On the 7th of June the plaintiffs insured a coal-laden ship called the Hampden on a voyage between the prescribed ports. The Hampden was lost on the 18th of September. The loss was posted at Lloyd's on the 24th of December. Further declarations were made on the 10th of August, and were in excess of the second policy. The Hampden was not declared either on the 29th of June nor on the 10th of August.

On the 24th of October the plaintiffs applied to the defendants for a covering slip, which was sent them by the defendants, and on the 25th of October a third policy was subscribed and issued by the defendants in the same terms in all respects as the two previous policies. On the 2d of November the plaintiffs declared the Hampden, and claimed for a loss. At this time and when the third policy was effected the plaintiffs knew of the loss of the Hampden.

It was admitted at the trial, and in the argument, that the plaintiffs had taken a risk of a coal cargo in respect of the Hampden, and that there was a loss which would be covered by the policy of insurance, if the plaintiffs were not debarred from attributing it to one of the said policies by reason of delay in declaring the risk. It was also undisputed that, taking the risks in chronological order, the Hampden did not come under either of the first two policies, which were by previous risks exhausted, when the plaintiffs took the risk in the Hampden, but must rank under the third policy (if under any), which was effected on the 25th of October.

It was also undisputed that the plaintiffs' manager had been most negligent in not declaring the Hampden, but the defendants admitted that there was no want of good faith on his part nor on the part of the plaintiff company.

It was also admitted that a usage in fact existed such as that in *Stephens v. Australasian Insurance Company* (<sup>1</sup>), to the effect that in the case of open policies on ships to be declared there is a usage of merchants and underwriters that the policy attaches to the goods as soon as, and in the order

(<sup>1</sup>) Law Rep., 8 C. P. 18; 4 Eng. R., 296.

in which they are supplied, in which order the assured is bound to declare them, and in case of mistake as to the order of shipment the assured is bound to rectify the declaration, which is sometimes done after loss.

1878. Dec. 14. *C. Russell, Q.C., and Myburgh*, for the plaintiffs: The loss of coal cargoes in ships is undoubtedly a marine risk. The defendants undertook to reinsure against it, and, as is admitted, were acting *intra vires* in doing so. Then, having accepted such risks, \*they are affected [169 by the customs regulating the business of marine insurance, and their contract with the plaintiffs was therefore subject to the custom found and stated in *Stephens v. Australasian Insurance Company* ('): "According to the usage of the insurance business, when a policy is effected on goods by ship or ships to be thereafter declared, the policy attaches to the goods as soon as and in the order in which they are shipped; and directly the assured knows of the shipment of the goods he is bound to declare them to the underwriter on the policy, and to declare them in the order in which they are shipped. He is not entitled to declare some of the risks, and remain his own insurer as to the others. In case by oversight or otherwise the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations and make them correspond with the order of shipment. The underwriter would require to see the bills of lading, and could insist on the declarations being made to follow the sequence of the bills of lading. The declarations are often thus rectified, and sometimes even after loss." If this custom applied, then the plaintiffs were not only entitled, but bound, to rectify their declarations so as to make the risks declared come in chronological order under the policies. They could not pick and choose the risks to be declared, but must, for the advantage of the defendants, who get the benefit of the risks which are run out, declare every risk which was within the terms of the policy, and therefore may claim the correlative right to correct their declarations. A declaration may be altered even after the loss is known, if such alteration be made without fraud: *Stephens v. Australasian Insurance Company* ('). No fraud is suggested here. The provision in the agreement for supplementary policies is equivalent to a covering note or slip, which is a complete and final contract binding upon the underwriters in honor and good faith, and therefore the plaintiffs were not bound

(') Law Rep., 8 C. P., 18; 4 Eng. R., 296.

1879 Imperial Marine Insurance Co. v. Fire Insurance Corporation.

to declare at the time of effecting the third policy, that the risk on the Hampden had already fallen in: *Cory v. Patton* (<sup>1</sup>).

*Herschell*, Q.C., and *Wheeler*, for the defendants: The defendants are a fire insurance corporation. Their limited [170] reinsurance was \*against fire only, although the original insurance by the plaintiffs was marine. The defendants could neither be expected to know the usages of marine insurance nor to contract with reference to them. Therefore the custom in *Stephens v. Australasian Insurance Company* (<sup>2</sup>) does not apply, and the policy did not attach until the risk was declared, which was not until after loss. A covering slip is, but for the Stamp Acts, an actual policy; but this agreement is to make, as it were, a policy *in futuro*. *Cory v. Patton* (<sup>1</sup>) does not apply. In the present case the point to be regarded is the time at which the stipulation was to come into operation, viz., when the second policy became exhausted. But the loss occurred and was known before it was exhausted, and the declaration was afterwards made.

Secondly, the negligence of the plaintiffs' manager in declaring the loss disentitles them to recover. His improper mode of conducting business was calculated to afford a dangerous facility of fraud: *Parsons on Marine Insurance*, ed. 1868, p. 520.

*Myburgh*, replied: The defendants have chosen to share one of several marine risks, and must be taken to know the usages of the business in which they engage. No reason whatever has been suggested why the usage in question should not apply to these insurance policies; many might be given to show that it ought to apply. Further, the contract is peculiar. It is that the plaintiffs continuing their ordinary business of marine insurance, shall be reinsured by the defendants for a year. There is no necessity for any declaration at all. It is remarkable that the words "as may hereafter be declared" are omitted from the agreement. The only object of the declarations under the contract is to show when the policies are exhausted. The stipulation for successive policies is even more effective than the ordinary slip, because it is inserted in a valid signed and stamped policy.

That negligence should avoid a contract is a proposition unknown to our law.

*Cur. adv. vult.*

(<sup>1</sup>) Law Rep., 7 Q. B., 304; 10 Eng. R., 189.

(<sup>2</sup>) Law Rep., 8 C. P., 18; 4 Eng. R. 296.

March 13. LOPES, J., after stating the case as hereinbefore set \*out, proceeded: The defendants contended [171 that they, the defendants, not being a marine insurance company, the usage stated in *Stephens v. Australasian Insurance Company* (1) did not attach. As the case depends mainly on whether this custom applies or not, it is convenient first to consider that question. I think it does. The argument is that the usage does not attach because the plaintiffs are insurers against marine risks, and the defendants are insurers against fire. It is conceded, however, that it is within the powers of the defendant company to reinsure against loss by fire in case of ships at sea. The plaintiffs here insure against perils by sea generally, and in order to ease their liability, they reinsure their risks in respect of coal-laden vessels for a limited amount in each case and in respect of fire only, and between specified ports, with the defendants. The contract with the defendants is a contract of fire insurance no doubt, but a contract of fire insurance in respect of a marine risk. The defendants when they entered into that contract were doing the trade or business of marine insurance. The plaintiffs in the course of their business undertook certain marine risks, the defendants for their own benefit take upon themselves to indemnify the plaintiffs against one of those marine risks (being a risk against fire). It was a marine risk in the hands of the plaintiffs, and did not become less so when undertaken by the defendants. When the defendants contracted with the plaintiffs they contracted with them according to the usage of the particular trade or business to which the contract related. It related to the trade or business of marine insurance. I think, therefore, the usage in *Stephens v. Australasian Insurance Company* (1) applies.

This being my view, it is not necessary for me to determine how the case would stand if that usage did not attach. I will only say that it appears to me that if the usage did not attach the contract could not be regarded as an ordinary open policy on ship or ships to be hereafter declared. Having regard to the terms of the contract between the parties, I should be inclined to adopt the argument that there is no necessity, except as a matter of convenience (as showing when one policy was exhausted, \*and an- [172 other had become necessary), that there should be any declaration, but that the policy attached when the risk was incurred.

It was argued by Mr. Wheeler, on the part of the defend-

(1) Law Rep., 8 C. P., 18; 4 Eng. R., 296.

1879

Bryant v. Lefever.

ants, that the negligence of the plaintiffs' manager was such that it afforded facilities for fraud, and consequently disentitled the plaintiff from recovering. A passage from Parsons on Insurance was relied on. I am not prepared to hold there was such negligence, nor can I find any authority for Mr. Wheeler's contention. I am of opinion that the plaintiffs, having acted in good faith, are not debarred by that delay in making a declaration on the Hampden from recovering.

*Judgment for the plaintiffs, £1,000 with costs.*

Solicitors for plaintiffs: *Field & Roscoe.*

Solicitors for defendants: *Leaoyd & Co.*

[4 Common Pleas Division, 172.]

March 22, 1879.

[IN THE COURT OF APPEAL.]

BRYANT V. LEFEVER and Another.

*Easement—Right to Passage of Air—Action for obstructing Access of Air to Chimney of Dwelling House—Nuisance.*

The access of air to the chimneys of a building cannot, as against the occupier of neighboring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under the Prescription Act (2 & 3 Wm. 4, c. 71).

*Webb v. Bird* (13 C. B. (N.S.), 841; 31 L. J. (C.P.), 335.) followed.

The plaintiff and the defendants were occupiers of adjoining houses. For more than twenty years the occupiers of the plaintiff's house had enjoyed the access of air to the chimneys of it. The defendants took down their house, and rebuilt a wall to a greater height, thereby causing the plaintiff's chimneys to smoke:

*Held*, that no action was maintainable by the plaintiff against the defendants, either on the ground that the plaintiff had acquired an easement which the defendants had interfered with, or on the ground that the nuisance complained of had been created by the defendants.

CLAIM alleged that the defendants occupied premises adjoining the plaintiff's house, and that "before the circum-173] stances hereinafter \*set out the plaintiff had always, and for much more than twenty years, a free access of air to his chimneys, which were on the side of his house next to the house of the defendants. About the month of June, 1876, and after the plaintiff was in occupation of his said house, the defendants raised the walls of their house so high, and put stacks of timber on the roof of the said house, so as to interfere with and prevent the free access of air to the plaintiff's chimneys, and prevented a proper draught in the same, and the plaintiff was totally unable to use his said chimneys, and the enjoyment by the plaintiff of his house was much diminished and injured."



Defence: a denial of the allegations of the claim. Issue thereon.

At the trial before Lord Coleridge, C.J., and a special jury during the Hilary Sittings in Middlesex, 1878, the following facts were proved:

The plaintiff and the defendants were occupiers of adjoining houses, which were of about the same height. Before 1876 the plaintiff was able to light a fire in any room of his house without the chimneys smoking; the two houses had remained in the same condition some thirty or forty years. In 1876 the defendants took down their house, and began to rebuild it. They carried up a wall by the side of the plaintiff's chimneys much beyond its original height, and stacked timber on the roof of their own house, and thereby caused the plaintiff's chimneys to smoke whenever he lighted fires.

Lord Coleridge, C.J., allowed the claim to be amended by introducing an allegation that, by reason of the facts therein mentioned, the defendants created a nuisance to the injury and prejudice of the plaintiff in respect of his enjoyment of his house and premises.

The jury found in substance that for more than twenty years there had been free access of air to the chimneys of the plaintiff's house, and also that the erection of the defendants' wall sensibly and materially interfered with the comfort of human existence in the plaintiff's premises. They assessed the damages at £40, and Lord Coleridge, C.J., directed judgment to be entered for the plaintiff.

The defendants appealed.

\*1878. Dec. 11, 12. *Gates*, Q.C., and *Edward* [174 *Clarke*, for the defendants: Although the jury have found in favor of the plaintiff, yet the defendants are entitled to succeed. No action will lie for the interference by them with the access of air to the plaintiff's chimneys. The defendants cannot be prevented either from raising the height of the roof of their own house, or from placing timber upon it. The plaintiff cannot claim that smoke shall freely escape from his building, either as a natural right of property, or by way of easement. *Webb v. Bird* (1) is very like the present case, and is practically conclusive upon it. The cases as to support for buildings from adjoining soil cited in *Angus v. Dalton* (2) show that the analogous claim to the access of air to a chimney is unsustainable. The alleged nuisance merely consisted in hindering the escape of something disagreeable,

(1) 10 C. B. (N.S.), 268; 30 L. J. (C.P.), 384; in Ex. Ch., 13 C. B. (N.S.), 841; 31 L. J. (C.P.), 335. (2) 3 Q. B. D., 85; 28 Eng. R., 80; on appeal, 4 Q. B. D., 162; 28 Eng. R., 706.

1879

Bryant v. Lefever.

which the plaintiff himself has produced upon his own premises.

*A. Cock (Staveley Hill, Q.C., with him)*, for the plaintiff: An action will lie for stopping the flow of air, whereby the convenience or value of a building is lessened: *Aldred's Case* <sup>(1)</sup>. It is found by the jury that the comfort of human existence in the plaintiff's house has been materially interfered with; and this is sufficient to entitle him to redress by either injunction or action, or both, *Walter v. Selfe* <sup>(2)</sup>; and as by the erection on the defendants' house the smoke which would otherwise escape from the chimneys was forced back into the plaintiff's house, he is entitled to relief, on the ground that he is suffering inconvenience from a nuisance: *Dent v. Auction Mart Co.* <sup>(3)</sup>.

[COTTON, L.J.: In that case Wood, V.C., alludes to the distinction between a claim to the access of air and a claim to the access of light; and this distinction is also pointed out by Lord Selborne, L.C., in *City of London Brewery Co. v. Tennant* <sup>(4)</sup>.]

Moreover, the occupiers of the plaintiff's house have for twenty years enjoyed as of right the access of air to the chimneys; and this is sufficient to raise the presumption, [175] that the enjoyment was \*commenced by virtue of a grant, Starkie on Evidence, part iii, ch. i, p. 750 (4th ed.), and this being a presumption of law, it is unnecessary that the jury should find that a deed of grant was actually executed: Taylor on Evidence, vol. i, part i, ch. v, par. 132, p. 148 (7th ed.); *Deeble v. Linehan* <sup>(5)</sup>.

*Gates, Q.C.*, in reply: The act, of which the plaintiff complains, was done by the defendants upon their own property: it is for the plaintiff to make out that it was unlawful.

*Cur. adv. vult.*

1879. March 22. The following judgments were delivered:

BRAMWELL, L.J.: The judgment which I am about to read is that of Brett, L.J., and myself.

The plaintiff says that he is possessed of a house, that for more than twenty years this house and its occupants have had the wind to blow to, over and from it, and that he has, as so possessed, the right that it should continue to do so: that the defendants have interfered with this right and prevented

<sup>(1)</sup> 9 Rep., 58 b.

<sup>(5)</sup> Law Rep., 2 Eq., 238, at p. 252.

<sup>(2)</sup> 4 De G. & Sm., 315, at p. 323; 20

<sup>(4)</sup> Law Rep., 9 Ch., 212, at pp. 220, L. J. (Ch.), 433, at p. 435.

221; 8 Eng. R., 833-4.

<sup>(5)</sup> 12 Ir. C. L. Rep., 1.

the free access and departure of the wind: he adds that they have committed a nuisance to him as so possessed. He has proved that he is possessed of a house more than twenty years old; that the wind had access to it and passage over it for twenty years without the hindrance recently caused by the defendants; that the defendants have caused a hindrance by putting on the roof of their house (which is as old as the plaintiff's) timber, to a considerable height, thereby preventing the wind blowing to and over the plaintiff's house when in some directions, and passing away from it when in others: that this causes his chimneys to smoke as they did not before to the extent of being a nuisance. The question is if this shows a cause of action. First, what is the right of the occupier of a house in relation to air independently of length of enjoyment? It is the same as that which land and its owner or occupier have: it is not greater because a house has been built: that puts no greater burden or disability on adjoining owners. What then is the right of land and its owner or occupier? It is to have all natural incidents and advantages, as nature would produce them; \*there is a right to all the light and heat that [176 would come, to all the rain that would fall, to all the wind that would blow; a right that the rain which would pass over the land, should not be stopped and made to fall on it; a right that the heat from the sun should not be stopped and reflected on it; a right that the wind should not be checked, but should be able to escape freely; and if it were possible that these rights were interfered with by one having no right, no doubt an action would lie. But these natural rights are subject to the rights of adjoining owners, who, for the benefit of the community, have and must have rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbors, rights to use their property in the various ways in which property is commonly and lawfully used. A hedge, a wall, a fruit tree, would each affect the land next to which it was planted or built. They would keep off some light, some air, some heat, some rain, when coming from one direction, and prevent the escape of air, of heat, of wind, of rain, when coming from the other. But nobody could doubt that in such case no action would lie; nor will it in the case of a house being built and having such consequences. That is an ordinary and lawful use of property, as much so as the building of a wall, or planting of a fence or an orchard. Of course, the same reasoning applies to the putting of timber on the top of a house, which, if not a common, is a perfectly

1879

Bryant v. Lefever.

lawful act, and it would be absurd to suppose that the defendants could lawfully put another story to their house with the consequences to the plaintiff of which he complains, but cannot put an equal height of timber. These are elementary and obvious considerations, but if borne in mind will assist very materially in the decision of this case.

The plaintiff then, merely as possessed of land or house, has not the right claimed. But he goes further, and says that the house and its owner and occupiers have had the enjoyment of this benefit for twenty years. He therefore relies on that as showing a prescriptive title, or title by lost grant. Whether he has so stated his claim as to raise such a case it is not necessary to say, for we are of opinion that even if he has, he has not established it, that no such right as he claims can be established by mere enjoyment without interruption for however long a period. It \*certainly cannot be claimed under the Prescription Act (2 & 3 Wm. 4, c. 71); nor can it by lost grant, unless of such a character that it could be claimed by the common law prescription, for the expedient of a lost grant is only applicable to cases where something prevents the application of the common law prescription; we do not say there might not be an express grant or covenant not to interfere with the passage of air over neighboring property, which could be enforced against the grantor or covenantor, and even against his assigns with notice; whether it could against assigns without notice it is not necessary to say. But the lost grant doctrine is ancillary to the common law prescription doctrine; can this right, then, be claimed under that? Now, certainly, the land as such has enjoyed this of right for all time, since the sun first shone and the wind first blew; and it is not a case of twenty or any finite number of years. But that enjoyment is the result of the natural right of which we have spoken, and not of an acquired right. Then, does the existence of a house on the land for twenty years make any difference? None. The owner of the land enjoyed the free passage of the air over his land when it was a field, subject to the right of his neighbors to build on their own land, or to do on their own land any lawful act. He now enjoys it over his land with a house on it, subject to the same rights. If the house on his land is less commodious by reason of any lawful act of his neighbor done on the adjoining land, then, to use the expression of the judges in *Bury v. Pope*<sup>(1)</sup>, "it was his folly to build his house so near to the other's land." It may be said that if this reasoning is correct, it is

(1) Cro. Eliz., 118.

applicable to lights; so it is to a great extent, and any one who reads the cases relating to the acquisition of a right to light will see that there has been great difficulty in establishing it on principle. Willes, J., says it is anomalous, *Webb v. Bird*<sup>(1)</sup>; and, per Blackburn, J., *Webb v. Bird*<sup>(2)</sup>. In the case referred to of *Bury v. Pope*<sup>(3)</sup>, it was held that where there are owners of adjoining pieces of land, and one builds a house, and for thirty or forty years has access of light to it, yet the other may build a house adjoining and shut out the light. This shows the general principle, though the law as to light is now different, as a right is [178 gained to it by enjoyment. But there is this difference between the present claim and the claim to light. The right in that case is always limited to the particular window or aperture through which the light and air have had access; it is one, therefore, against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. Lord Wensleydale<sup>(4)</sup> thought this a very strong thing as a great burden on the adjoining landowner. But here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land. The principle of *Chasemore v. Richards*<sup>(5)</sup> is applicable, namely, that the right claimed is not one the law allows, being too vague and uncertain; one the acquisition of which the adjoining owner could not defend himself against; and that the remedy of the plaintiff in such a case as this is to build higher, as in such a case as that it was to dig deeper. We are of opinion that on principle the plaintiff fails to make out his right as claimed; the authorities are to that effect. *Webb v. Bird*<sup>(6)</sup> is really in point. It is true that in that case the mill appeared to have been built in 1829. I believe the date of the building of the plaintiff's house in this case did not appear: it will hardly be supposed to be 100 years old. But the reasoning in that case would be equally applicable to a claim by prescription from time whereof the memory of man runneth not to the contrary, if the date of the building of the plaintiff's house could not be shown. It is really hardly necessary to notice the other cases, which are sufficiently dealt with by the judges in *Webb v. Bird*<sup>(7)</sup>. We may, however, mention *Roberts v. Macord*<sup>(8)</sup>, where Patteson, J., was of opinion

<sup>(1)</sup> 10 C. B. (N.S.), at p. 285.

<sup>(2)</sup> 7 H. L. C., 349.

<sup>(3)</sup> 13 C. B. (N.S.), at p. 844.

<sup>(4)</sup> 10 C. B. (N.S.), 268; in Ex. Ch., 18

<sup>(5)</sup> Cro. Eliz., 118.

C. B. (N.S.), 841.

<sup>(6)</sup> See *Chasemore v. Richards*, 7 H. L. C., 349, at p. 386.

<sup>(7)</sup> 1 Mo. & Ro., 230.

<sup>(8)</sup> 1 Mo. & Ro., 230.

1879

Bryant v. Lefever.

that a claim like the present could not be supported. All the reasoning and all the considerations that prevailed in *Chasemore v. Richards* (') are opposed to it. Where it has been said that there is a right to air, there is good ground for supposing that the wholesomeness of the air had been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place. 179] \*We are of opinion, then, that the action cannot be maintained on this ground.

But it is said, and the jury have found, that the defendants have done that which has caused a nuisance to the plaintiff's house. We think there is no evidence of this. No doubt there is a nuisance, but it is not of the defendants' causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough. It is the plaintiff who causes the nuisance by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall, that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney, let him carry it higher, and there would be no nuisance. Who, then, causes it? It would be very clear that the plaintiff did, if he had built his house or chimney after the defendants had put up the timber on theirs, and it is really the same, though he did so before the timber was there. But (what is in truth the same answer), if the defendants cause the nuisance, they have a right to do so. If the plaintiff has not the right to the passage of air, except subject to the defendants' right to build or put timber on their house, then his right is subject to their right, and though a nuisance follows from the exercise of their right, they are not liable. "*Sic utere tuo ut alienum non laedas*" is a good maxim, but in our opinion the defendants do not infringe it: the plaintiff would if he succeeded.

COTTON, L.J.: This is an appeal of the defendants from a judgment of Lord Coleridge in favor of the plaintiff in respect of the interruption of air to the plaintiff's chimney caused by the defendants.

The jury have found, first, that there had been for more than twenty years free access of air to the chimneys of the plaintiff's house; secondly, that the defendants interfered with it; thirdly, that the erection of the defendants' wall sensibly and materially interfered with the comfort of human existence in the plaintiff's premises; fourthly, that

(') 7 H. L. C., 349.

the plaintiff sustained damage £40 by the building of the defendants' wall.

The first question is, whether the plaintiff has, either as a natural right of property or as an easement, a right as against the \*defendants to have the access of air to [180 his chimney without any interruption by the defendants. In my opinion he has no such right.

In my opinion it would be a contradiction in terms to say that a man has a natural right against his neighbor in respect of a house which is an artificial addition to, and not a user of, the land. That the owner of a house has, as against his neighbor, no natural rights in respect of his house, is shown by the cases as to subjacent and lateral support. These show that while every owner of property has, independently of user, a natural right to support for his land, if he adds buildings to his land and thereby requires an increased support, he, in the absence of express grant, can only acquire a right to such support by user, that is, by way of easement. The right (if any) of the plaintiff to the uninterrupted flow of air to his chimney must therefore be by way of easement. Cases to prevent, or to claim damages for, interference with ancient lights, are frequently spoken of as cases of light and air, and the right relied on as a right to the access of light and air. But this is inaccurate. The cases, as a rule, relate solely to the interference with the access of light, and in no case has any injunction been granted to restrain interference with the access of air. It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbor's property has been enjoyed as of right for a sufficient period, a right by way of easement could be acquired. No such point is made in this case, and I am of opinion that a right by way of easement to the access of air over the general unlimited surface of a neighbor cannot be acquired by mere enjoyment. For this *Webb v. Bird* (\*) is an authority, and as the last decision in that case was in the Exchequer Chamber, it would be sufficient to rely upon the authority of that case. But I think it better to say that I entirely agree with that decision and with the reasons given in this case by Bramwell, L.J. In my opinion, therefore, the plaintiff has no right in respect of the flow of air to or from his chimney.

Every man, however, has a natural right to enjoy the pure air and free from any noxious smells or vapors, and any one who \*sends on to his neighbor's land that which [181

(\*) 10 C. B. (N.S.), 268; in Ex. Ch., 13 C. B. (N.S.), 841,  
30 ENG. REP.

1879

Hayn v. Culliford.

makes the air there impure, is guilty of a nuisance. Here it is found that the erection of the defendants' wall has sensibly and materially interfered with the comfort of human existence in the plaintiff's house, and it is said this is a nuisance for which the defendants are liable. Ordinarily this is so, but the defendants have done so, not by sending on to the plaintiff's property any smoke or noxious vapor, but by interrupting the egress of smoke from the plaintiff's house in a way to which, as against the defendants, the plaintiff has no legal right. The plaintiff creates the smoke, which interferes with his comfort. Unless he has, as against the defendants, a right to get rid of this in the particular way which has been interfered with by the defendants, he cannot sue the defendants, because the smoke made by himself, for which he has not provided any effectual means of escape, causes him annoyance. It is as if a man tried to get rid of liquid filth arising on his own land by a drain into his neighbor's land. Until a right had been acquired by user, the neighbor might stop the drain without incurring liability by so doing. No doubt great inconvenience would be caused to the owner of the property on which the liquid filth arises. But the act of his neighbor would be a lawful act, and he would not be liable for the consequences attributable to the fact that the man had accumulated filth without providing any effectual means of getting rid of it.

I am of opinion that the judgment appealed from must be reversed.

*Judgment for the defendants.*

Solicitors for plaintiff: *Sorrell & Son.*

Solicitors for defendants: *Wilkins, Blyth & Fanshawe.*

---

[4 Common Pleas Division, 182.]

March 22, 1879.

[IN THE COURT OF APPEAL.]

182] \*HAYN, ROMAN & CO. v. CULLIFORD and Another.

*Ship and Shipping—Bill of Lading, Clause excepting Liability for Acts of Master and Crew—Stowage, Negligence in.*

Bags of sugar shipped by the plaintiffs were carried in the defendants' steamship from H. to L. at an agreed freight. The vessel was chartered for the voyage by P. & K., who signed the bill of lading as agents. It contained a clause that the owners of the ship should not be liable for the default of the pilot, master or mariners in navigating the ship, and a further clause that the captain, officers and crew in the transmission of the goods should be considered the servants of the shipper, owner or consignee. The sugar was negligently stowed under oxide of zinc,



and was consequently damaged. It did not appear how the sugar came to be shipped, nor with whom the plaintiffs made the contract of carriage:

*Held*, that the defendants were liable to compensate the plaintiffs for the damage done to the sugar; for either the defendants had contracted to carry the sugar upon the terms set out in the bill of lading, which did not relieve them from responsibility for negligent stowage; or if they had not contracted with the plaintiffs, they were liable for misfeasance, that is, for stowing the goods in such manner as to come into contact with a mischievous substance.

APPEAL from the judgment of Denman, J., in favor of the plaintiffs (').

Action by the plaintiffs, the shippers of certain sugar, against the defendants, who were shipowners, to recover damages for injuries to the sugar by reason of its having been negligently stowed on board the defendants' ship.

By a charterparty dated the 15th of November, 1877, made between the defendants, owners of the ship *Cleanthes*, and Pott & Korner, merchants, through their ship-broker W. Zoder, it was agreed that the ship, after discharging her inward cargo, should load from the merchants a full and complete cargo of general lawful merchandise at Hamburg, and proceed to one wharf only in London, as ordered by charterer's correspondents, and deliver the cargo on payment of freight (for sugar) at the rate of 7s. 6d. per ton gross weight delivered; "it being agreed that for the payment of all freight, dead freight, and demurrage, the master or owner shall have an absolute lien on the cargo, which lien they shall be \*bound to exercise; the charterer's [183 liability to cease when cargo is shipped, and bills of lading signed; the captain to sign bills of lading at rates as presented without prejudice to this charterparty."

Pott & Korner, on the arrival of the ship at Hamburg, put her up as a general ship; and the plaintiffs shipped 280 bags of sugar on board the vessel to be carried to London. At the time of the shipment they had no knowledge of the charterparty. The bill of lading was as follows: "Shipped in good order and well conditioned, in and upon the steamship *Cleanthes*, whereof is master P. Andrews, now lying at Hamburg, and bound for London, 280 bags of sugar, &c., which are to be delivered in like good order and condition to Hayn, Roman & Co., or their assigns, freight at the rate of 7s. 6d. sterling plus 10 per cent. per ton gross weight to be paid by consignees. The act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry, and collision, fire on board or on shore, and all accidents, loss, or damage, of whatsoever nature or kind, or however occasioned, from machinery, boilers, steam and

(') 3 C. P. D., 410. *ante*, p. 259.

1879

Hayn v. Culliford.

steam navigation, or from perils of the seas or rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship; the owners of the ship being in no way liable for any of the consequences of the causes above excepted; it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods as between the shipper, owner, or consignee thereof, and the ship and shipowner be considered the servants of such shipper, owner, or consignee. In witness whereof, the master or agent of the ship has signed four bills of lading of this tenor and date. Dated in Hamburgh, 19th Nov., 1877. Pott & Korner, agents."

At the trial there was no evidence as to the employment or otherwise of a stevedore in loading the cargo; but the defendants in answer to interrogatories stated that they believed the cargo was stowed by a stevedore employed by Zobel, who was the agent of the ship at Hamburg, at the expense of the ship. On the arrival of the ship in London, the plaintiffs, who were the holders of the bill of lading, took delivery of the sugar, and paid the freight to W. Watkins, the defendants' agent in London, and who gave a [84] \*receipt to the plaintiffs headed "Freight, per Cleantes," and signed "received for the owners." It turned out on examination of the sugar by the plaintiffs that, owing to certain casks of oxide of zinc having been stowed at Hamburg on the top of the sugar, the 280 bags were totally spoilt.

From the correspondence admitted at the trial it appeared that on the 4th of December, 1877, the defendants' firm in London wrote to the defendants in Sunderland, stating that a serious claim was pending, "apparently through the fault of the captain. Watkins will no doubt make the best of the case for the steamer; but why the captain stowed poison in casks on top of sugar in bags it is difficult to understand, and may prove serious to him." On the 5th of December the plaintiffs wrote to Watkins demanding the full value of the sugar. On the 6th of December Watkins replied, denying that the sugar was totally spoilt, and stating "if damaged no doubt it was by perils of the sea." On the 10th of December Watkins, under instructions from the defendants, referred the plaintiffs to the charterers.

The jury found the damage to the sugar was caused by bad stowage, and assessed the damages at £501 6s.; and the learned judge, after an adjournment of the case for further consideration, held that there was a contract between the plaintiffs and the defendants for the carriage of the goods, and directed judgment to be entered for them.

Dec. 17. *Butt*, Q.C., and *J. C. Mathew*, for the plaintiffs.  
*W. Williams*, Q.C., and *C. Bowen*, for the defendants.

Two points were argued: first, whether there was a contract to carry with the defendants as shipowners; secondly, if there was, whether the defendants were discharged from liability to the plaintiffs by reason of the exceptive clause in the bill of lading.

The cases cited were those mentioned in the court below.

*Cur. adv. vult.*

March 22. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.,) was delivered by

BRAMWELL, L.J.: This case comes before us in a very unsatisfactory way so far as relates to one of the [185 questions principally argued before us. We are not told how the goods came to be shipped, and are left to guess with whom the plaintiffs made their contract of carriage. We are, however, satisfied that the plaintiffs are entitled to recover. The case is in a dilemma. Either there was a contract between the plaintiffs and the defendants, or there was not. If there was a contract between them, it is the one contained in or evidenced by the bill of lading. Now, it is clear that if that is the contract, the defendants are liable on the ordinary contract of a carrier unless (and there is not) there is some clause in the contract to relieve them; whether the words in other respects would extend to this case we need not say, as there is one respect in which they do not; they extend to the acts of captain, officers, and crew; they do not extend to the acts of the defendants and their other agents and servants, therefore not to the acts and defaults of the stevedore. But it is by these acts and defaults that the goods were damaged. If then there is a contract between the plaintiffs and defendants, the defendants are liable. So also if there is not. For if so, the case is this: The goods were lawfully with the defendants' license in their ship, and they tortiously so dealt with them that the goods were injured. It was found, as a fact, that the loading of the oxide was negligent. It was therefore wrongful, not as a breach of contract, but as a wrongful act in itself. If the defendants had done what was done wilfully, that is to say intentionally, that it would injure the plaintiff's goods, it is clear they would be liable. But what difference does it make, that they did it ignorantly? It may be asked where is the duty of care? I answer that duty that exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained

1879

Stannanought v. Hazeldine.

of, it is a misfeasance; an act and wrongful. Suppose A. lets B. a horse, B., with C.'s license, puts up at C.'s stables for reward to C. from B., C. turns into the stables loose a vicious horse, known to be so, not to injure A.'s horse, but not thinking of the matter; there cannot be a doubt that C. would be liable to A. if the horse was injured. So if he gave the horse bad oats which injured the horse he would be liable, though he would not be to A. if he omitted to feed him; so here justice is done, though indirectly. It is 186] certain \*that if the charterers sued on the charter in respect of the complaint in this action there would be no defence, and it is certain that they ought to sue if necessary for the benefit of the plaintiffs. The judgment must therefore be affirmed.

*Judgment affirmed.*

Solicitor for plaintiffs: *W. A. Grump & Son.*

Solicitors for defendants: *Hollams, Son & Coward.*

[4 Common Pleas Division, 191.]

March 14, 1879.

191] \*STANNANOUGHT, *Appellant*; HAZELDINE,  
*Respondent.*

*Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 4—Communicating Information as to Votes before Close of Poll—Personating Agent—Information charging more than one Offence—Jervis's Act, 11 & 12 Vict. c. 43, s. 10.*

By the Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 4, every officer, clerk, and agent in attendance at a polling-station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate before the poll is closed to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station.

An information was laid against the respondent under the above section, charging that he, being a personating agent duly appointed and in attendance at a certain polling station in connection with a municipal election for a town councillor, did not then and there maintain and aid in maintaining the secrecy of the voting in such station, but did then and there communicate before the poll was closed to a certain person or persons certain information as to the names and numbers on the register of voters of certain electors who had and had not applied for ballot papers or voted at that election. It appeared that the respondent, having been appointed personating agent, as stated in the information, attended at the polling booth with a copy of the burgess-roll, and remained there some hours placing a mark against the name of each voter who obtained a ballot paper, and then before the close of the poll left the station taking with him his copy of the burgess-roll, which he left in the committee room of the candidate by whom he was employed. There was no proof that the copy of the burgess-roll was seen by any person while in the room:

*Held*, that there was not sufficient evidence to warrant a conviction under the above section, as there was no proof that the information as to the voters was actually communicated to any person, and it was not enough that the means of acquiring such information were afforded to any one.

*Quere*, whether, under 11 & 12 Vict. c. 43, the information was defective as being for more than one offence?

[4 Common Pleas Division, 197.]

April 25, 1879.

\*WEST V. HOUGHTON.

[197]

*Damages—Measure of—Sporting Lease—Covenant to keep down Rabbits—Breach of—  
Damage to Covenanted's Tenant—Nominal Damages.*

A lease was made between the plaintiff and defendant by which the plaintiff granted exclusive rights of sporting over his estate to the defendant, who covenanted that he would during the term keep down and destroy the rabbits on the estate, so that no appreciable damage might be done to the crops thereon. Appreciable damage was done to the crops of an occupier of the land by rabbits on the estate, but the plaintiff never was under any liability to compensate the occupier for any such damage, and paid him no sum whatever in respect thereof. In an action for breach of covenant:

*Held*, that the plaintiff having suffered no damage himself, and not being in the position of a trustee for the occupier, was entitled only to nominal damages.

CASE stated on appeal from the Denbigh County Court.

The appellant was plaintiff and the respondent defendant in an action tried in that court.

The plaintiff claimed £50 damages for breach of covenant.

The covenant was contained in a lease of sporting rights dated the 30th day of March, 1876, and made between the plaintiff of the one part and the defendant of the other part.

Copies of lease, &c., were set out in appendices, which also contained the preliminary correspondence between the defendant and the agent of the plaintiff, and an unexecuted engrossment as proposed by the agent, with the defendant's pencil alterations thereon shown in red ink.

The admission of the correspondence and unexecuted engrossment was objected to by the plaintiff at the hearing, and formed part of the case, subject to his right to urge the objection upon the hearing of the appeal.

The covenant for the alleged breach of which this action was brought was as follows: "And shall and will during the said term keep down and destroy the rabbits on the said estate, so that no appreciable damage may be done to the crops on the said estate."

It was admitted for the purpose of the case that John Roberts, who was at the time of the action the occupier of the farm (portions of the estate in respect of which the damage was alleged \*to have been caused), was also tenant thereof at the time of the making of the lease of the sporting rights to the defendant, and that the defendant at the time of the making of the lease had no reason to suppose that any portion of the estate was occupied by the plaintiff personally or otherwise than by his tenants.

It is admitted for the purpose of the case that the plaintiff never was under any liability to compensate the occupier of the farm for any damage done to his crops by rabbits, and that he had in fact paid him no sum whatever in respect of such damage.

At the trial it was contended for the plaintiff that he was entitled to recover such damages as would be sufficient to compensate the occupier for the injury caused to the crops on the estate, by the defendant's breaches of covenant, on account of and for the benefit of such occupier, and as trustee for such occupier, on the ground that the covenant in question was inserted in the agreement for the benefit of the occupier and not for the personal benefit of the plaintiff, and in support of his right to sue as such trustee the case of *Robertson v. Wait* (1) was cited.

It was contended on the part of the defendant that the covenant did not bear the alleged construction, and that, even if a breach of covenant were proved the plaintiff was not entitled to recover more than nominal damages for breach of the covenant, as he had personally sustained no damage and was under no liability to the occupier, and that he was not entitled to recover in the action on account of or as trustee for the occupier.

The judge while the plaintiff's case was proceeding intimated that in his opinion the point raised should be decided by the superior court, and, after argument upon the facts herein stated and the admission of the defendant in the next paragraph contained, gave judgment for nominal damages, and gave the plaintiff leave to raise the point of law hereinbefore mentioned by way of this appeal to the High Court of Justice.

For the purposes of this case (but not otherwise) it was admitted that appreciable damage had been done to the crops of the occupier by rabbits on the said estate during the subsistence of the lease.

199] \*The question for the opinion of the court was: Whether the plaintiff was, under the circumstances hereinbefore set forth, entitled, under the lease of the 30th of March, 1876, and the covenant therein contained, to recover any, or (if any) more than nominal damages for the injury caused to the crops of the occupier by the defendant not having kept down and destroyed the rabbits on the estate so that no appreciable damage was done to the crops of the estate.

By the sporting lease set out in an appendix the defendant

(1) 8 Ex., 299; 22 L. J. (Ex.), 209.

covenanted, *inter alia*, that he would carefully preserve the game from depredations by poachers and others and not suffer it to be diminished in quantity or value, save only by fair and ordinary sporting, and at the end of the term leave a fair and sufficient and usual number of such game, rabbits, and fowl, on the premises for the propagation and maintenance of the usual and average stock. Then followed the covenant in question, and covenants for payment by the lessee of rates and taxes and against assignment and to deliver up at the end of the term without notice to quit, and a proviso that in case of non-payment of rent, or wilful breach of the provisions of the lease, the plaintiff might determine the term thereby granted by notice addressed to the defendant at his last known place of abode in England without prejudice to his liability to pay all rent then due, or which should become due for the then current year.

*McIntyre*, Q.C., and *McIntyre*, for the plaintiff: The covenant is precise and the breach admitted. The measure of damages is the value of the crops injured by the breach. The plaintiff is in the position of a trustee for the occupier whose crops were damaged. In *Robertson v. Wait* <sup>(1)</sup> a charterparty contained a stipulation that the vessel was to be consigned to Ewins & Co., on the usual terms, one of which was, that Ewins & Co. might procure the homeward freight at a commission. The charterers having agreed with Ewins & Co. for a share in the commission, brought an action against the defendants for a breach of this stipulation, but failed to prove in what proportion the commission was to be divided. The Court of Exchequer held that as the \*clause was inserted for the benefit of Ewins & Co., [200 the plaintiffs were entitled to recover as trustees on their behalf, notwithstanding they failed to show their interest in the commission. "If," said Martin, B. <sup>(2)</sup>, "a person makes a contract whereby another obtains a benefit, why may not the former sue for it?" and Parke, B., asked "What is the object of inserting the particular clause in the charterparty, except for the benefit of Ewins & Co., and in order that they may receive the homeward freight?" adding, "Therefore, in that respect the contract was made on their behalf."

[LORD COLERIDGE, C.J.: There Ewins & Co. were expressly named in the contract.]

But were not parties to it. That the occupier is not named in the present covenant makes no difference; the stipulation

<sup>(1)</sup> 8 Ex., 299; 22 L. J. (Ex.), 209.

<sup>(2)</sup> 8 Ex., 299, at p. 301.

1879

West v. Houghton.

was inserted for his benefit. He was then and is still the occupier of the land.

[LORD COLERIDGE, C.J.: How could the occupier get the damages if recovered out of the pocket of his landlord?]

By an action for money had and received, or in chancery.

*W. R. Kennedy*, for the defendant: The plaintiff is only entitled to nominal damages, for he has suffered no damage.

[DENMAN, J.: It seems rather improbable that an express covenant should be made to secure only nominal damages.]

The landlord protected himself against damage by retaining a power of giving notice and determining the lease if the covenant were broken. It is evident from the terms of the lease that the parties intended that the game should be kept up. The earlier correspondence shows it. The plaintiff seeks to construe the lease as an undertaking to compensate the tenant for damage to crops. A covenant to that effect is common in such leases, but has been purposely omitted from this lease. No authority can be cited to support such an action by a trustee for a *cestui que trust*, where there is neither a liability to pay over the sum sued for, nor any sum paid; *Robertson v. Wait* (1) is not an authority, for there *Ewins & Co.* were expressly included in the terms of the charter, and the charterers were taking an interest in the commission, although the evidence of the agreement to 201] \*divide it being in writing, and not produced, was rejected. In this sporting lease neither Roberts nor any class of persons, amongst whom he might be included, is named. He did not enter the farm on the faith of the covenant in the sporting lease. He was in before. The landlord has not compensated him from the appreciable damage to his crops, and is under no liability to do so. Damages paid to the landlord could not be recovered from him by the occupier.

*McIntyre*, Q.C., replied: The intention of the parties must be ascertained from the lease alone.

LORD COLERIDGE, C.J.: I am of opinion that the proper measure of damages in this case is the damage done to the covenantee, which is merely nominal. The object of the plaintiff in making the covenant was, doubtless, to protect his tenant, and there are well known forms of language whereby that object might have been attained. But the parties have used language to which the effect contended for on behalf of the plaintiff could only be given by doing

(1) 8 Ex., 299; 22 L. J. (Ex.), 209.



violence to the ordinary rules of construction. A lease is made between the plaintiff and defendant, and the sporting rights of the plaintiff over his estate are demised for a certain term to the defendant. One of the covenants in this lease is that the lessee "shall and will during the said term keep down and destroy the rabbits on the said estate, so that no appreciable damage may be done to the crops on the said estate." We are to take it as a fact that this has not been done; and we are also to take it as a fact that the tenant has no right to compensation from his landlord for any damage which he, the tenant, may sustain from the excessive use of the sporting rights by the defendant keeping up too much game; and that no money has been paid by the landlord to the tenant as compensation. It has been argued that, nevertheless, the true measure of damage is the damage which would have accrued to the tenant in the original lease, who is no party to the sporting lease, and who, neither under the sporting lease nor the original lease has any legal claim whatever against his landlord—in terms. Of course he could have none under the original lease which is silent as to compensation. But it is said, and it was necessary to contend, that under the \*sporting lease he has such [202 right by the true effect of the covenant, that the landlord has a right to recover the damage to the tenant as trustee for the tenant, and that the damage so recovered would be recovered for his *cestui que trust*. I asked in vain during the argument how, supposing the plaintiff recovered £50 and got it from the sporting lessee, the tenant could get it out of his landlord's pocket; an action for money had and received, or proceedings in chancery could only lie on the ground that the law or the words in this covenant constituted the landlord a trustee for the tenant in respect of such damages; but, if so, the *cestui que trust*, by ways and means known to the law, could compel the trustee to sue for his benefit. How would it be possible, on the words of this lease, to contend that the tenant could compel the landlord, if the landlord were unwilling, to bring an action for the breach of this covenant? It appears to me perfectly clear that it was a matter between the covenantor and covenantee, and that, inasmuch as the covenantee only is able to sue, all that he can recover is the damage to himself. Mr. Kennedy pointed out in his interesting and clever argument that this conclusion does not at all reduce the covenant to a nullity, because there is a proviso by which the lessor retains a right to turn the sporting lessee out for breach of covenants, and, *inter alia*, for breach of this covenant. Moreover, if in

defiance of remonstrance, the sporting lessee persisted in breaking the covenant, the lessor could by injunction restrain it. So there would be ample protection for the rights of his tenant. That is clear. The only case cited is, for the reasons given in argument, not in point. I entirely agree with the decision and reasons given for it in *Robertson v. Wait* (<sup>1</sup>); there Ewins & Co. were named in a charterparty as the persons who were by the terms of it to collect the freight; the plaintiff agreed that Ewins & Co. should procure homeward freights on certain conditions, and that commission should be divided in certain proportions between them. So the plaintiff had a right to sue for that freight partly as trustee for Ewins & Co. who were interested in it to a certain extent, and partly for themselves. I should willingly submit to that case, if in point. But it is not. Because here, 203] in the first place, there \*is no one mentioned as the object of the covenant except the covenantee; and secondly, in *Robertson v. Wait* (<sup>1</sup>), the person standing in the position of covenantee had a direct and important interest in bringing the action, and so, as he had that interest, and, as to the rest, was trustee for the person named, the action was properly held to lie.

DENMAN, J.: I am of the same opinion. I think we ought to decide this case wholly without reference to the other documents set out in the appendices, and that it turns on the meaning of the lease of sporting rights; and I do not found my judgment on the other documents. But having regard to the lease itself and to the facts stated in the case, I am of opinion that the judgment for only nominal damages was right. It has been contended that the plaintiff was entitled to more than nominal damages, there having been appreciable damage done by rabbits on the estate, and that he was entitled to sue as trustee for the occupier of the land. I am of opinion that is not so, on the short ground that there was no evidence here of any trust between him and the occupier at the time of entering into the covenant. I think for the reasons given by my Lord that *Robertson v. Wait* (<sup>1</sup>) is quite different and does not apply, and that, as the damage here was nil, the judgment for merely nominal damages was right and ought to stand.

*Judgment affirmed.*

Solicitors for plaintiff: *Dean & Taylor.*

Solicitors for defendant: *Harvey, Alsop & Stevens.*

(<sup>1</sup>) 8 Ex., 299; 22 L. J. (Ex.), 209.

[4 Common Pleas Division, 204.]

April 27, 1879.

**\*THE YORKSHIRE BANKING COMPANY V. BEATSON [204  
and MYCOCK.**

**THE LEEDS AND COUNTY BANKING COMPANY V. BEATSON  
and MYCOCK.**

*Partnership—Style of—Name of Individual Member—Signature to Bill of Exchange—  
Liability of Firm—Evidence.*

If the name of a partnership firm be merely the name of an individual partner, proof that he signed such name to a bill of exchange is not enough to make the firm liable on the bill. To establish the liability, the holder of the bill must further prove that the signature was put to it by the authority and for the purposes of the firm.

### ACTIONS upon bills of exchange.

The causes were tried before Lindley, J., at Leeds, during the last autumn assizes.

The jury found verdicts for the plaintiffs. A rule *nisi* to set them aside and for a new trial was afterwards obtained and argued.

The proceedings, facts, and arguments sufficiently appear in the judgment of the court.

Dec. 5, 1878. *Digby Seymour*, Q.C., and *Tindal Atkinson*, for the plaintiffs, showed cause.

*Waddy*, Q.C., and *Gainsford Bruce*, for the defendant Beatson, in support of the rule.

In addition to cases cited in the judgment, the following authorities were referred to: *Cox v. Hickman* (<sup>1</sup>); *In re Agriculturist Cattle Insurance Company*, *Baird's Case* (<sup>2</sup>); Pollock on Partnership, pp. 24, 25; *Kirk v. Blurton* (<sup>3</sup>); *Shirreff v. Wilks* (<sup>4</sup>); *Lloyd v. Ashby* (<sup>5</sup>).

April 27, 1879. DENMAN, J., delivered the judgment of the Court (Denman and Lopes, JJ.).

In these two actions, the second of which was to abide the event of the first, the plaintiffs were the holders of bills of exchange. Beatson had allowed judgment to go by default; the question was whether Mycock was liable as Beatson's partner.

\*The first action was brought upon two bills, one [205 for £276 15s. at four months, dated the 6th of March, 1878, drawn by one Kelly on one Wilson, and indorsed "William Beatson;," the other for £484 13s. at four months, dated the

(<sup>1</sup>) 8 H. L. C., 268; 30 L. J. (C.P.), 125.

(<sup>3</sup>) 9 M. & W., 284.

(<sup>2</sup>) Law Rep., 5 Ch., 725.

(<sup>4</sup>) 1 East, 48.

(<sup>5</sup>) 2 B. & Ad., 28.

1879

Yorkshire Banking Co. v. Beatson.

13th of March, drawn by one Carr, addressed to "Mr. William Beatson, Chemical Works, Rotherham," and accepted and indorsed "William Beatson." The bills were discounted by the plaintiffs on the 14th and 18th of March respectively. It appeared that these bills were renewals of earlier bills originating in accommodation transactions between the defendants Beatson, and Carr, Kelly and Wilson; and that the bills were accepted and indorsed by Beatson without the knowledge of Mycock. Before January, 1878, Beatson had carried on the business of a chemical manufacturer at Rotherham. On the 1st of January the two defendants entered into partnership in the said business, on the terms that the style of the firm was to be "William Beatson," that the defendant Beatson should have the whole management of the business, and that neither partner should have authority to draw, indorse, or accept bills without the previous consent in writing of the other. The plaintiffs never heard of the existence of any partnership until long after the discount of the bills, viz., on the 17th of July, and knew nothing of Mycock until then. Beatson had kept an account at the Sheffield and Rotherham Bank for fifteen years. After the formation of the partnership no change was made, either in the heading of his account at the bank or in the method of keeping it. It was headed "William Beatson, Esq." The firm had no separate account. The proceeds of the bills went into this account, and Beatson drew on this account from time to time to pay for goods supplied to the business, but his account with the bank was overdrawn, and he had drawn out of the account, for his own purposes, a much larger sum than was brought into the account by the proceeds of the bills in question.

It appears to us that the liability or non-liability of the defendant Mycock in this case must turn mainly on the question whether, when the name of a firm is identical with that of an individual member of it, and that individual member accepts or indorses bills of exchange directed to or indorsed by him in his own name, being also that of the 206] firm, these are to be taken to be *\*prima facie* the bills of the firm, or the bills of the individual member; in other words, on whom is the burden of proof? On the plaintiff to show that the bill is one which the individual member had authority to draw so as to bind the firm; or on the defendant to show the contrary?

In the case now under consideration the learned judge put two questions to the jury, first: "Was the name William Beatson put to the bills to denote the firm or to denote Wil-

liam Beatson only?" and, secondly, "Did the bank take the bills as the bills of the chemical works, whoever their proprietors might be, or as the bills of William Beatson only?"

The jury found as follows: "The bill dated the 13th of March having been drawn by Josiah Carr & Son upon William Beatson, at the address, Chemical Works, Rotherham, we agree that William Beatson's acceptance of it must be held to denote the acceptance of the firm. The bill dated the 6th of March gives no evidence upon the point put by the judge."

If the case turned upon whether these findings were satisfactory or not, for the purpose of giving judgment we should be of opinion that they were not, and that, even if there was evidence which required to be submitted to a jury at all in the case, there must have been a new trial. The reasons given by the jury show that they were not answering the questions put to them by the learned judge, but rather laying down the proposition that Carr addressing the bill to Beatson at the works, and the bill being accepted by him, was evidence that it was a bill intended to be addressed to the firm, and therefore binding upon the firm. The bill was in fact addressed to "Mr. William Beatson, Chemical Works, Rotherham," which was his residence; and we think that this mode of addressing the bill is really no evidence at all, as against Mycock, that the bill was a bill of the firm, or one which the plaintiffs had any ground for considering to be a bill binding on any one but William Beatson personally. The jury being asked afterwards what they said as to the bill of the 13th of March, said that "from the fact of its being put in connection with the other they supposed it must follow the same result."

Both sides contended that it was not necessary to have left any questions to the jury at all, Mr. Seymour for the plaintiffs, urging \*that because "William Beatson" [207 was the firm's name, and the defendant Mycock a sleeping partner in a firm of that name, he was liable as in an ordinary case of partnership with an ordinary firm's name, such as "A. & Co.," or "A. & B.," or "A. B. & Co.," Mr. Waddy for the defendant, on the other hand, contending that "William Beatson" was *prima facie* the name of the man William Beatson, and that it lay on the plaintiffs to establish that a bill accepted or indorsed by him in that name was a bill of the firm and not of the individual. The rule was granted on the ground that the learned judge was wrong in leaving the questions he left to the jury, and that the verdict was against the evidence. But it was also con-

1879

Yorkshire Banking Co. v. Beatson.

tended upon the argument for the defendant Mycock that he ought to have judgment upon the ground that there was no evidence at all which could properly have been left to the jury in support of his liability, and that upon the undisputed facts the judgment ought to have been entered for him. Several authorities were cited on both sides which we propose briefly to consider.

The question is stated as follows in the 12th ed. of Byles on Bills, p. 48. "If a man be at the same time a partner in two distinct firms, but each firm use the same style, and he draw a bill in the common name of both, it has been held that an indorsee may charge either firm at his election. *But* where the name of the firm is the same as the name of the individual, and the bill is drawn by the individual for his separate benefit, *perhaps* the firm is not pledged."

In *Wintle v. Crowther* (1), Bayley, B., draws a distinction between the case where a partnership name is pledged, and the case of *Ex parte Bolitho* (2) in which a joint and separate trade was carried on in the name of the same individual. In the latter case it was held that the firm was not liable unless it could be shown that the bill was drawn as a bill of the firm, and not as a bill of the individual only. On the other hand, in the case of *Furze v. Sharwood* (3), where the defendants were trustees to carry on the business of an embarrassed firm, A. M. & K., in the name of M. alone, and they employed M. to carry on the business, it was 208] \*held, under the particular circumstances of the case, that the indorsements of certain bills indorsed by M. in his own name, were *prima facie* the indorsements of the defendants, and that the onus of showing that the indorsements were made on account of the separate business and not on that of the trustees, which was the general and ostensible business, was on the defendants. The court, however, in that case lay stress upon the fact that the bills were discounted with persons who were in the habit of discounting for the firm who had assigned their effects to the defendants, and said that the cases cited (*Ex parte Bolitho* (2) included) were not inconsistent with the view they took of the case under consideration; so that we think that case can hardly be regarded as laying down that in every case the onus is upon the defendants, where a bill is drawn by a person whose name is the same as that of the firm to which they belong, to show that the bill is not the bill of the firm. In the present case the only evidence, beyond the bill itself, given to show whether it was a bill intended to bind the

(1) 1 C. &amp; J., 316, at p. 318.

(2) 1 Buck., 100.

(3) 2 Q. B., 333.

firm was the evidence of Beatson himself who swore that he did not so intend; that the bills in question were not signed by him in respect of any trade transactions, but accommodation bills, never brought into any partnership book or account. Of course it was competent to the jury to disbelieve Beatson, but, unless the onus of proof lay upon the defendants, we think there was no evidence upon which the jury could have found properly for the plaintiffs upon that question, and nothing which could have been properly put to the jury as evidence to contradict Beatson in that respect. The only evidence relied upon by the plaintiffs for the purpose, was the fact that Beatson had paid the proceeds of the bills into the account kept in his name at the bank; but inasmuch as that account was always overdrawn so far as he was concerned, but so far as the business was concerned there was always a balance in hand, we do not think that his improper conduct in raising money on bills for his own purposes in his own name can properly be held to have had the effect of binding the partnership, or to amount to evidence that the bills were accepted or indorsed for the purposes of the firm.

Many other authorities were cited from the English reports; \*none exactly in point, but bearing more or less upon the question whether in such a case as the present the presumption is in favor of or against the liability of the dormant partner.

In *Emly v. Lye* (<sup>1</sup>), where one of two partners drew bills in his own name, which he procured to be discounted by a banker through the same agent who had procured the discount by the same banker of bills drawn in the name of the partnership, it was held that the banker had no remedy upon the bills so drawn, though the proceeds were carried to the partnership account, the money being advanced solely on the security of the persons whose names were on the bills, by way of discount, and not of loan to the partnership, although the bankers conceived at the time that all the bills were, in fact, drawn on the partnership account. In that case Lord Ellenborough, C.J., says, "Nothing passed from the defendants to induce the plaintiff to believe that it was a partnership concern, and to lend his money on that account." Grose, J., adds, "At the time when the discount took place, the partnership had made no contract with the discounteer, who, therefore, must be taken to have purchased the bills of" the one partner only. Le Blanc, J., says: "To charge the defendants on these bills, they must appear

(<sup>1</sup>) 15 East, 7.

to have been drawn for and on account of the partnership;" and Bayley, J.: "There was no contract made between the parties at the time." This case appears to us to be strong to show that where no credit is given to a partnership on the face of the bill, the presumption of law must be that the individual signing the bill is the only person liable for it, in the absence of express proof of authority from his partners to bind the firm by bills given in his own name, as well as of the particular bill being, in fact, a bill signed for the purposes of the partnership. The case of *South Carolina Bank v. Case*(<sup>1</sup>), which was strongly relied upon by the plaintiffs' counsel, appears to us not to assist the plaintiffs in the present case, because there the transaction in question was in its commencement one entered into for the partnership under such circumstances as to make them liable for the dealings of the individual member. It has been doubted whether that case was rightly decided; see *Miles*' 210] *Claim*(<sup>2</sup>); but it is enough to say that \*it turned upon the question whether the individual who signed the bills had, at the time he signed them, an authority to pledge the credit of the firm by an indorsement in his own name; see per Bayley, B., in *Smith v. Craven*(<sup>3</sup>); and the case was one in which the bills were not accommodation bills, as in the present case, as between the party whose signature was relied upon, and the other original parties to the bill.

In *Stephens v. Reynolds*(<sup>4</sup>), it was held that where A. and B. carried on business in partnership in the name of B., and A. accepted a bill in B.'s name for goods supplied to the partnership, B. was liable, though the bill was not addressed to the place where the partnership business was carried on, but to a place where he carried on a separate business. There is some difficulty in understanding the report of that case, and Bramwell, B., did not agree with the judgment pronounced, but it does not assist us, because it is clear that the main ground of the decision of the majority of judges was that the bill had been accepted for goods supplied to the firm.

The case of *Edmunds v. Bushell*(<sup>5</sup>) was not a case of partnership, but a partnership name was used where the whole business was the business of the defendant, so that the persons advancing money on the bills were necessarily led to suppose that they were advancing money to a collection of persons in business, or on the faith of a business

(<sup>1</sup>) 8 B. & C., 427.

(<sup>2</sup>) 1 C. & J., 500, at p. 507.

(<sup>3</sup>) Law Rep., 9 Ch., 635, at p. 649; 10 Eng. R., 634.

(<sup>4</sup>) 5 H. & N., 513.

(<sup>5</sup>) Law Rep., 1 Q. B., 97.



being carried on, and not, as in this case, without anything to lead them to suppose that they were dealing with the individual only whose name appeared on the bills. The case of *Swan v. Steele* <sup>(1)</sup> is also a case in which the bills sued upon were accepted in a partnership name, properly so called, and is therefore not in point. *Vere v. Ashby* <sup>(2)</sup> is open to the same observation; so also is the case of *McNair v. Fleming* <sup>(3)</sup>, cited by Lord Redesdale in 3 Dow., 229.

In the last edition of Lindley on Partnership, p. 342, the learned author lays down the law as follows: "Again, persons may carry on business in partnership in the name of one of themselves, and if they do, they will be liable on bills accepted by him in that \*name, *if it was in [21] fact used to denote* all the partners: but not otherwise." This does not mean that the liability of the firm depends simply upon the question whether the person accepting has in his own mind an intention of improperly making his partner liable on bills accepted for his own accommodation. The meaning is that the firm will be bound if the bill was given for a partnership purpose, or for what purported to be a partnership purpose, and was not known to be otherwise by the person taking the bill. This statement, moreover, only applies to ordinary trading partnerships which are *prima facie* bound by bills given by one partner in the name of the firm. The learned judge himself, having read this judgment, has authorized us to give this explanation of the passage in question

We think there is great force in Mr. Waddy's argument that if the mere fact that there is a partnership carried on in the name of one partner, were to make the firm liable for all bills accepted by that partner, it would be possible for him to bind his partner to an unlimited extent for all his own private debts, unless the partner could show affirmatively facts which should disentitle the plaintiffs, who never heard of his existence, to make him liable upon the bill. It may no doubt be said that it is his own fault for allowing his partner to carry on business in his own name. But this seems to us to be no ground for making the innocent partner liable for debts incurred by the guilty partner wholly for his own purposes, and not for the benefit of the partnership, in a case where the name used in no way invites the person advancing money on the bills to consider that there is any plurality of persons undertaking the liability, and where there are no circumstances to lead that person to suppose that he is dealing with a firm.

(1) 7 East, 210.

(2) 10 B. & C., 288.

(3) 3 Dow., 229.

In *Miles' Claim* (<sup>1</sup>), James, L.J., forcibly states the law as follows: "It is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless his name, or the name of some partnership or body of persons, of which he is one, appears either on the face or on the back of the bill." We think that this is a true statement of the law, subject only to the qualification that in cases where a partnership is carried on in the name of an individual without a partnership style, 212] \*and it is affirmatively proved that the bill in question is one executed for partnership purposes, or with the authority of the partner, the name of the individual may have the same effect as the name of a partnership or body of persons in ordinary cases has without such proof.

In America it has long since been decided and uniformly held that where the name of one partner is identical with that of the firm, the burden of proof is upon the plaintiff to show that the bill is the paper of the firm, and not of the individual partner. Parsons on Bills of Exchange, p. 131, so states the law, and it was so laid down by the Supreme Court of New York, in *Oliphant v. Matthews* (<sup>2</sup>), and by Story, J., in *United States Bank v. Binney and Others* (<sup>3</sup>), who explains the law as follows: "Where the contract is made in the name of the firm, it will *prima facie* bind the firm unless it is *ultra* the business of the firm. Where the firm imports, on its face, a company, as A. B. & Co. or A., B. & C., there the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there in order to bind the firm, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion, and for that purpose. In other words, it must be shown to be used for partnership objects, and as a partnership act." See also Story on Partnership, §§ 106 and 142.

We think that this is in accordance with the true principles of the law of agency, of which the law of partnership is a branch, and that the weight of English authority is in favor of the American view of the law. Mr. J. A. Russell, in the 11th ed. of Chitty on Bills, lately published by him, states, at p. 37, the law, as we think, correctly, to the same effect.

(<sup>1</sup>) Law Rep., 9 Ch., 633, at p. 643; 10 Eng. R., 634.

(<sup>2</sup>) 16 Barb., 608, at p. 610.

(<sup>3</sup>) 3 Mason, 176, at p. 183.

We are of opinion then that this was a case in which the plaintiffs were bound affirmatively to prove the defendant's liability on the bills in question, by proving something more than that the defendant was a partner in business with Beatson.

It is, indeed, argued on behalf of the plaintiffs that there \*was evidence in the case of the proceeds of these [213 bills being applied for the purposes of the firm, and of such a dealing between the defendants as that an authority might properly be inferred. If we thought this was so, we should still have thought it necessary, owing to the manner in which the questions were put and answered by the jury, to have made the rule absolute for a new trial; but for the reasons given above, we are of opinion that there was no evidence at all proper to be submitted to the jury in favor of the plaintiffs' contention. The bills were clearly accommodation bills for Beatson's benefit; there was nothing on the face of them to indicate that any but Beatson was to be bound. The only evidence given as to the intention to bind Mycock was against such intention, and there was no general or special authority to Beatson to draw bills, or evidence of a mutual intention that Mycock should be so bound.

Under these circumstances, we feel bound, under the power given to us by Order XL, Rule 10, to enter judgment for the defendant Mycock with costs, and to set aside the judgment for the plaintiffs as against him.

*Judgment for the defendant Mycock with costs.*

Solicitors for plaintiffs: *Jacobs & Vincent.*

Solicitors for defendant Mycock: *Learoyd & Co.*

See 25 Eng. Rep., 416 note.

The principal case was affirmed in the Court of Appeal, 5 C. Pl. Div., 100.

A., B. and C. were partners of a firm, of which A. had the sole management and charge. A. having borrowed money from D. and given receipts signed with his name (which was also that of the firm), D. on the dissolution of the partnership sued the partners for repayment:

Held, that the money having been proved to have been borrowed by A. from D. for the purposes and on the credit of the firm, the partners were bound in repayment, it not being requisite that it should be further proved that A. had actually applied the money to firm purposes: *Cumming v. Hay*, 17 Scottish L. Repr., 207.

See also *Story on Part.*, §§ 139, 142-3; *Williams v. Gillies*, 75 N. Y., 197, 203; *Ontario Bank v. Hennessey*, 48 id., 545; *National Bank v. Thomas*, 47 id., 15, 19-20; 1 *Lindley on Part.* (Ewell's ed.), 266, marg. paging, note; 1 *Collyer on Part.* (Wood's ed.), 644, 659.

Attorneys at law who are partners in the practice of their profession and not partners *in trade*, according to mercantile law, have no implied authority to become parties to negotiable instruments and to bind the firm thereby, unless such authority is given by the terms of the partnership, or expressly given or recognized by both, or may be implied from the general habits of the partners in their business transactions *Friend v. Durgie*, 17 Florida, 111.

One partner cannot bind the firm for

money borrowed by him to pay for his share of the capital stock, especially where the lender knows for what purpose the money is obtained: *McLinden v. Wentworth*, 51 Wisc., 170.

A firm is not liable for a debt contracted by one partner on his individual responsibility, although the consideration goes into the firm business, if, as between the partners, the debt ought to be paid by the one who contracted it: *McLinden v. Wentworth*, 51 Wisc., 170.

One having notice that a firm note is given for an individual debt, or outside of the partnership business, cannot recover thereon. The transaction itself is frequently notice: *Union, etc., v. Underhill*, 21 Hun, 178, 182, and cases cited.

See *Osgood v. Glover*, 8 Daly, 367.

The fact that one member of a firm signs the firm name as guarantor to a promissory note, is notice to the payee of such note that he is signing such name outside the scope of the partnership business, and it will not bind the firm unless some authority other than the mere fact of partnership or a subsequent ratification is shown.

The burden of showing such authority rests upon the payee of the note: *Spurck v. Leonard*, 9 Bradw. R., 174.

One member of a firm, by virtue of the partnership, has no legal right to sign the firm name as surety or guarantor for a third party, and if he does so, the act, as to the members not consenting, will be a nullity: *Spurck v. Leonard*, 9 Bradw. R., 174.

The firm of C. F. P. & Co. made their promissory note, payable to their order, and indorsed the same.

L., one of the firm, and also a member of the firm of J. S.'s Sons, indorsed his own name and the name of the latter firm thereon without their knowledge or consent, and delivered it to a firm to whom he was individually indebted, to be applied upon the debt, who transferred the note to plaintiffs for value, before maturity, plaintiffs having no notice of the circumstances attending the execution of the note.

In an action against the members of the firm of J. S.'s Sons upon the indorsement, held, that the defendants were liable.

One of the firm, to whom L. trans-

ferred the note, was one of the directors of the plaintiff.

Held, that it was not thereby made chargeable with, or affected by, his knowledge of the transaction; that the knowledge acquired by him, not as an officer of the plaintiff or while engaged in its business, but in an individual capacity, could not operate to its prejudice, nor was there any presumption that he communicated it to plaintiff: *Atlantic State Bank of Brooklyn v. Savery*, 82 N. Y., 291.

Where one partner, without the knowledge or consent of his copartner, pays his own note to a private creditor out of the funds of the insolvent firm, such creditor knowing that the money belonged to the firm, the fund so received will be regarded as held by the private creditor in trust for the benefit of the firm, and may be attached in his hands upon a trustee process instituted against the firm by one of its creditors: *Johnson v. Hersey*, 70 Maine, 74.

On the dissolution of a firm and the formation of a new one, consisting in part of the same members, the new firm cannot be bound, without the consent of all its members, for the debts of the old: *McLinden v. Wentworth*, 51 Wisc., 170.

Where one of the partners in a joint adventure extends the joint adventure in its natural lines, and acquires for that purpose funds raised partly on the credit of the copartners and partly by a mortgage over the copartnership assets, it will be presumed that the property was acquired for the joint adventure, and that the purchaser is bound to account to the copartner suing him therefor: *Davie v. Buchanan*, 18 Scottish Law Reporter, 217.

The rule of law is, that the partnership in any business ceases when there is an end to the business itself: *Spurck v. Leonard*, 9 Bradw. R., 174.

After dissolution of a partnership, the authority for making new contracts is completely revoked.

The giving of a promissory note, or the acceptance of a bill of exchange or draft, is the making of a new contract, although it may be for a prior debt: *Spurck v. Leonard*, 9 Bradw. R., 174.

The evidence of authority to sign the firm name as guarantor is unsatisfactory; but even conceding that such authority once existed, it ceased at the

time the firm ceased to do business, and the subsequent signing as guarantor upon a renewal of the original note cannot bind the members of the firm not consenting. The signing being under color of the partnership, notice of its dissolution is sufficient notice that the guaranty was signed without authority: *Spurck v. Leonard*, 9 Bradw. Rep., 174.

Death of one partner terminates the partnership. The survivors have no right to continue the business: *Oliver v. Forrester*, 96 Ills., 315.

Death of one partner terminates all unexecuted portions of the partnership. The survivors have no right to carry out or execute their provisions: *Oliver v. Forrester*, 96 Ills., 315.

If a surviving partner is required to execute contracts entered into by the

firm before the death of a member thereof, it is only so as to contracts entered into with persons not members of the firm, and not, in respect to contracts made between the several members of the firm, as to the mode of conducting the partnership business: *Oliver v. Forrester*, 96 Ills., 315.

Survivors may make small purchases to carry on the business, but have no right to make any considerable purchase: *Oliver v. Forrester*, 96 Illinois, 315.

Liability and rights of survivors who have made purchases: *Oliver v. Forrester*, 96 Ills., 315.

A surviving mortgagee may give a valid discharge thereof. Such a discharge is ample protection to a *bona fide* purchaser: *Dilke v. Douglas*, 5 U. C. App. R., 63.

[4 Common Pleas Division, 221.]

May 19, 1879.

**\*BELMONTE and Others v. AYNARD and Another. [221]**  
**PAUL GÜTSCHOW and E. FORD (Trustee), Claimants.**

*Practice.—Plaintiff in Interpleader—Claimants residing Abroad—Nominal Plaintiff—Security for Costs—Order LV, r. 2.*

Where a litigant who resides abroad is for mere convenience made plaintiff in an interpleader issue, but does not substantially occupy the position of the plaintiff commencing an action, he will not be ordered to give security for costs.

MOTION, referred from chambers, for an order that the plaintiffs should give security for costs.

In May, 1877, Paul Gütschow, residing and trading at Yokohama, in Japan, consigned bales of silk to Aynard & Rüffer, merchants in London, they having agreed to make advances on the bales to the extent of 90 per cent. of their value. Aynard & Rüffer having made the advances, and deeming themselves insufficiently secured, owing to a fall in the market price of silk, applied to F. Gütschow, a merchant residing at Hamburgh, who was the representative, in Europe, of Gütschow of Japan, for further security to cover advances made. Thereupon F. Gütschow sent to Aynard & Rüffer bills to the amount of about £1,200 as additional security.

\*In 1878, the market price for silks having im- [222]  
proved, the silk was sold by Aynard & Rüffer, and realized enough to leave a balance of £962 10s. in their hands upon

the amount obtained by the sale of the silks, and the proceeds of the bill beyond the amount of the advances.

Meanwhile Donner & Brehmer, merchants carrying on business in the city of London, to whom F. Gütschow, of Hamburg, was previously indebted in a sum exceeding such balance, upon a dishonored acceptance, had in December, 1877, attached in the hands of Aynard & Rüffer all moneys and goods belonging to F. Gütschow, of Hamburg, and commenced an action of attachment against them as garnishees in the Lord Mayor's Court. Donner & Brehmer afterwards went into liquidation, and E. Ford, their trustee in liquidation, continued the action in their name. F. Gütschow, of Hamburg, subsequently went into liquidation, and his trustees, Belmonte and others, the present plaintiffs, about January, 1879, commenced an action in the Common Pleas Division against Aynard & Rüffer to recover the balance of £962 10s.

Paul Gütschow, of Japan, also claimed the balance, as being the consignor of the goods.

Belmonte and others (F. Gütschow's trustees) all resided at Hamburg, beyond the jurisdiction of the court. E. Ford and Donner & Brehmer resided within the jurisdiction. Aynard & Rüffer entered an appearance in the action in the Common Pleas Division, and the plaintiffs, Belmonte and others, were ordered to give security for costs.

Aynard & Rüffer then took out an interpleader summons, upon which an order was made at chambers, directing an issue to be tried, in which Belmonte and others were to be plaintiffs and Paul Gütschow and E. Ford severally defendants, to determine the rights of the respective parties to this balance of £962 10s., and staying the proceedings in attachment in the meanwhile. E. Ford thereupon took out a summons calling upon the plaintiffs to give security for costs. The master made no order, and on appeal, Manisty, J., referred the matter to the court.

*Lamaison*, for the defendant Ford, in support of the motion: The plaintiffs reside out of the jurisdiction, and 223] should therefore \*be ordered to give security for costs. The claimant who is made a defendant under an interpleader rule stands in the same position as any other defendant, and is consequently entitled to security for costs as in other cases: 2 Chitty's Archbold's Practice, 12th ed., p. 1400; *Benazech v. Bessett* (\*). In *Williams v. Crosling* (†) the defendant in an interpleader resided out of the jurisdiction, and was made to give security. The courts of

(\*) 1 C. B., 313; 2 D. L., 801.

(†) 3 C. B., 957.

common law have always had the power of directing substantial security to be given where the plaintiff is a foreigner out of the jurisdiction, and the chancery practice, by which the amount of security was limited to £100, is now assimilated to that of the common law: *Republic of Costa Rica v. Erlanger* <sup>(1)</sup>.

*R. V. Williams*, for the plaintiffs: No case can be cited where security for costs has been ordered against a person who is in possession of the subject-matter of litigation. Although the trustees of the Hamburg firm have, for the sake of convenience, been made plaintiffs in form, they are not in substance the plaintiffs, and it is the real and not the nominal plaintiffs who, when they reside abroad, are liable to give security for costs. In *Benazech v. Bessett* <sup>(2)</sup> the plaintiff was so not merely in form but in substance. In *Williams v. Crosling* <sup>(3)</sup> the defendant was made to give security because he, as execution creditor, was virtually plaintiff. "Where the defendant is quasi a plaintiff, as in replevin, and he resides abroad, he may be compelled to find security for costs. So he may be compelled to do so in a feigned issue under the Interpleader Act:" 2 Chitty's Archbold's Practice, 12th ed., p. 1416, citing those authorities for the proposition which shows the true principle on which security for costs is ordered.

DENMAN, J.: The only question is whether Belmonte, the trustee in liquidation abroad of the firm at Hamburg, is bound to give security for costs in favor of Ford, who claims security. I think the principle on which security for costs is ordered is clearly this, viz., that one who is substantially in the position of plaintiff initiating an action, and is a foreigner residing abroad, shall be bound to give security for costs; and if Belmonte occupied that position as [224 between himself and Ford, we should as a matter of course order him to give security. It is, however, admitted on both sides that he is put in the position of plaintiff as against Ford simply for convenience of the proceedings, but in no sense, I think, can it fairly be said that he occupies the position of a plaintiff suing here, being a foreigner residing abroad. Mr. Lamaison has called our attention to several authorities, and invited us to say that they are in his favor. But I think the *ratio decidendi* is that the court, in considering a question of the present kind, will see whether the party against whom security is claimed, really is in the position of plaintiff or not. In some cases he is so, although

<sup>(1)</sup> 3 Ch. D., 62.

<sup>(2)</sup> 1 C. B., 313; 2 D. & L., 801.

<sup>(3)</sup> 3 C. B., 957.

he may be called defendant, and may come into the case in an unusual and anomalous way. I think *Benazech v. Bessett* (') quite distinguishable. Bessett claimed to be entitled to the wines, and was substituted for the defendant under the interpleader rule. But in substance the party there claiming was really the plaintiff, and not the defendant. The other case, which also was unusual and anomalous, was one in which the party ordered to give security was the party carrying on the litigation, and in the position of suitor or plaintiff in the sense of having initiated the proceedings. So here, I think it clear that Ford is the person attacking Belmonte, and in the position of plaintiff against him, and not Belmonte who is the plaintiff against Ford.

There is another case in which it has been held that the defendant is bound to give security if he be a foreigner residing abroad, viz., in replevin, and that is on the principle that the defendant in replevin is practically the plaintiff. He is the party for whom the proceedings are taken. He is the party initiating the proceedings and carrying on the litigation. So, regarding that as the principle, I think Ford, if he was living abroad, might—whatever his nominal position—be called on to give security. But Belmonte occupies an exactly contrary position, and we should be practically ordering the defendant to give security, instead of the plaintiff, if we made the order.

LINDLEY, J.: I am of the same opinion. I think we should, in the first place, look at the merits of the case to 225] see which of \*the parties is the real plaintiff and real defendant, and that the mere accident that one happens to be named plaintiff in the interpleader proceedings is not conclusive. There were several illustrations of this in the old chancery practice, for the rule was precisely the same as the rule of law; but, at the same time, if the defendant in a suit filed a cross bill and became plaintiff, he did not give security, because his claim was looked on as a matter of defence. So, if the plaintiff filed a bill to restrain an action at law, it was looked upon as a matter of practical defence, and he did not give security simply because he was plaintiff. Here the Hamburg firm are, in substance, sued by Ford for a debt.

Now that makes Ford, in effect, plaintiff as between these two, and although it is very true that Ford and the Yokohama firm have been substituted as defendants, it does not alter the substance of the case or bring it within the decision in *Benazech v. Bessett* ('). There the original plaintiff

(') 1 C. B., 813; 2 D. & L., 801.



remained the real plaintiff, and the court only held that the person substituted for the original defendant had a right to call on the plaintiff for security; the view we take of the case does not conflict with that. Although in form Ford is defendant, in substance he is plaintiff, and in the same position as if he were plaintiff.

The appeal should be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Ashurst, Morris & Co.*

Solicitors for defendants: *Saunders, Hawksford & Bennett.*

[4 Common Pleas Division, 233.]

June 12, 1879.

[IN THE COURT OF APPEAL.]

\*MIGOTTI V. COLVILL.

[233]

*Time, Computation of—Discharge of Prisoner after expiration of Sentence—  
Calendar Month, meaning of.*

A person sentenced to imprisonment for the space of one calendar month is entitled to be discharged on the day in the succeeding month immediately preceeding the day corresponding to that from which his sentence takes effect.

On the 31st of October the plaintiff was sentenced to be imprisoned for one offence for one calendar month, and for a second offence for a period of fourteen days, commencing after the expiration of the calendar month. Pursuant to his sentence, he was detained in custody until the 14th of December:

*Held*, that the detention was lawful, for as the calendar month did not expire until the 30th of November, he was not entitled to be discharged from the second term of imprisonment until the full period of fourteen days computed from the 1st of December had expired.

ACTION against the governor of the Middlesex House of Correction, Coldbath Fields, for improperly and unlawfully refusing to discharge the plaintiff from custody and set him at liberty, and keeping him in prison for one day longer than the term for which he was sentenced to be imprisoned.

At the trial before Denman, J., during the Middlesex Michaelmas Sittings the following facts were proved. On the 31st of October, 1876, the plaintiff had been sentenced by a metropolitan police magistrate to one calendar month's imprisonment, and to a further term of fourteen days, to commence from the expiration of the first sentence. He was received into the custody of the governor of the prison at 4.25 o'clock P.M. on the 31st of October, 1876, and was released from prison on the 14th of December, 1876, at 9 o'clock A.M.

The learned judge left the question of damages to the jury, who assessed them at 20s., and he then reserved the case for further consideration.

1879

Migotti v. Colvill.

Dec. 7, 1878. The following judgment was delivered by DENMAN, J.: The plaintiff had been convicted by a metropolitan police magistrate of two different assaults, and sentenced to imprisonment upon each conviction; the convictions took place \*at 11 A.M. on the 31st of October, and the commitments were drawn up in accordance with the sentences passed. For the first assault the plaintiff was sentenced to be imprisoned for one calendar month, and for the second assault fourteen days, to commence at the expiration of the imprisonment previously adjudged. He was taken into the custody of the defendant, the governor of Coldbath Fields Prison, during the afternoon of the 31st of October, and finally released at 9 A.M. on the 14th of December, having claimed to be released on the previous day.

It was contended for the plaintiff that the calendar month, the term of the first sentence, commenced at midnight on the 30th of October; so far I am of opinion that the plaintiff's contention was well founded. I can find no express authority on the point, but arguing from analogous cases, I think I ought so to hold. It has been held in many cases that as a general rule, except where it is necessary in order to settle which of two acts done on the same day is to prevail, the law takes no notice of part of a day, and that the first day to be counted is the day any part of which is occupied in the particular business which is to endure for a certain number of days in order to fulfil any requirement of the law. This principle is recognized in the often cited cases of *Combe v. Pitt* (1); *Field v. Jones* (2); *Glassington v. Rawlins* (3), where it was held that, under the statute which enacted that a trader lying in prison two months after an arrest for debt should be adjudged bankrupt, the day of arrest was to be included in the computation of two months; also in *Wright v. Mills* (4), and other cases; and this is stated to be the rule applicable to all judicial acts in the judgment of the Exchequer Chamber in *Edwards v. The Queen* (5). There are no doubt several cases in which, when the date is to run from an act done, it has been held that the day in which the act is done is to be excluded from the computation: *Lester v. Garland* (6). There are also cases in which, when a payment is to be made, or something is to be done, within so many days or months, or at the expiration of so many days or months, the day of the event within, or at the expiration 235] of, so \*many days from which payment is to be made,

(1) 3 Burr., 1434.

(2) 9 East, 151.

(3) 3 East, 407.

(4) 4 H. &amp; N., 488.

(5) 9 Ex., 628; 23 L. J. (Ex.), 165.

(6) 15 Ves., at p. 254.

or the act done, is not included in the reckoning. The case of a bill of exchange is a familiar instance. But I can find no authority for saying that the general rule ought not to apply to the case of a sentence of imprisonment. Nor can I see any ground for doubting that it applies to the case where the sentence is for a calendar month, or a given number of calendar months, just as much as a sentence for so many days. Holding, then, that the first sentence in the present case must be computed from midnight on the 30th of October, when did the calendar month expire? The plaintiff contends that it expired at midnight on the 29th of November at the latest; and he does so on the ground that, if not, the plaintiff under a sentence of one calendar month's imprisonment would have to undergo something more than a calendar month's imprisonment, inasmuch as he would be imprisoned for the whole of one day in October, that is, from midnight on the 30th to midnight on the 31st of October, plus twenty-nine days and something more. Therefore, it is argued, it follows of necessity that he will have actually been imprisoned during the whole calendar month of November plus one day in October.

It appears to me that this argument, however plausible, is not sound. The question is, what is the meaning of one "calendar month" at the time the sentence was passed. And I am of opinion that at that time, viz., on the 31st of October, those words meant a month ending on the day in the succeeding month corresponding to the day of the sentence according to the ordinary understanding of the words "this day calendar month." The whole difficulty of the case here arises from the fact of October having thirty-one days and November only thirty; but I think that a few considerations will show how that difficulty ought to be solved. Suppose, instead of the 31st of October, the sentence had been passed on the 26th, then, applying the rule mentioned above as to the commencement of the term, the prisoner would be entitled to count the whole of the 26th as a day of imprisonment; that is, the sentence would have begun to run from midnight on the 25th. I apprehend that none would contend that it would have expired before midnight on the 25th of November. Why? because that would be the expiration of the calendar month. Yet in that case, as in this, the \*calendar month spent in prison would [236 have been one of thirty-one days, not of thirty days. This seems to show that the meaning of "one calendar month" cannot be construed with reference only to the duration of

1879

Migotti v. Colvill.

the latter of the two months over which it may extend. If it did, then a sentence passed on the 29th of January would expire, not on the 28th of February, but at midnight on the 25th, because February being a calendar month of twenty-eight days, the prisoner would have in that sense spent a calendar month in prison.

In the case of bills of exchange, in which the word month is held to mean "calendar month," it is laid down by all the text-writers that bills at one month drawn on the 28th, 29th, 30th, or 31st of January will fall due (excluding the days of grace) all on the same day, viz., the 28th of February; or in Leap Year on the 29th. Byles on Bills, 12th ed., p. 200; Chitty on Bills, 11th ed., note at p. 264. Yet those drawn on the 28th and 29th would, according to the mode of reckoning here contended for by the plaintiff, have been running one or two days more than the whole of February, and therefore more than a calendar month. It is no doubt true that the law applicable to bills of exchange depends upon the usage of merchants, and is not necessarily applicable to other cases, but where the question is what is the true meaning of "one calendar month," it is useful to consider how such an expression is regarded in any case in which it is constantly used in familiar legal instruments. On the whole I am of opinion that a sentence of imprisonment for one calendar month, passed on any given day of any given month, is to be held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as the preceding month, then by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day, but as long as there is a day in the calendar numerically corresponding from which the sentence begins to run, so that it is unnecessary to trench upon a succeeding month, I see no grounds for anticipating the expiration of the sentence. This being so, it follows 237] that the plaintiff was not strictly entitled \*to his discharge until midnight on the 14th of December, being one calendar month and fourteen days from the time from which his first sentence begun to run, and fourteen days from its expiration.

I am of opinion for these reasons, that the plaintiff who was discharged at 9 o'clock on the 14th of December was not detained illegally, and I accordingly give judgment for the defendant with costs.

June 12. The plaintiff appealed.

The plaintiff appeared in person, and contended first, that the question was one for the jury and not for the judge, and that as they had found a verdict for him with 20s. damages, the judge had no jurisdiction to enter judgment for the defendant; and secondly, that his term of imprisonment expired on the 13th of December, and that he had been imprisoned one day too much.

*A. L. Smith*, for the defendant, was not heard.

BRAMWELL, L.J.: I am of opinion that the judgment of Denman, J., must be affirmed. No doubt it is a plausible argument that the prisoner having been confined during the whole of November, and one day in October, has been in prison for more than one calendar month. The difficulty arises from the fact that the term calendar month is not strictly applicable, except to the particular months named in the calendar, and is inaccurate as applied to a period composed of two parts of different months; such a period in strictness consists of portions of two calendar months. The anomaly has several curious consequences, and among them that of which the plaintiff complains. The only rule which can be laid down is, that where an imprisonment for a calendar month begins on a day in one month and terminates in another, so many days must be taken from the second month, if there are enough as will bring the time up to the day before that day in the second month which corresponds to the day on which the imprisonment began; that is, if the imprisonment began on the 5th it would end at 12 o'clock on the night of the 4th of the following month; if on the 25th it would end on the 24th; if on the 29th it would end on the 28th; that is to say, we \*must take as [238 many days in the second month as had already passed in the month in which the imprisonment took place before the imprisonment. The plaintiff says that as he was imprisoned on the 31st of October, and had been in prison until the 30th of November, he had been imprisoned for the whole calendar month and one day, and therefore he ought to have been let out on the 29th. But if he had been sent to prison on the 29th he would have been liberated on the 28th, and if on the 30th he would have been liberated on the 29th. There is another difficulty, suppose he had been sent to prison for two calendar months he would certainly not have been liberated until the 30th of December. The rule I have laid down is therefore a sensible rule, which never operates to the detriment of the prisoner. If he is sent to prison in a long month, he gets thirty-one days; if he is sent to prison in a

short month he gets thirty days ; if he is imprisoned in February he would have the advantage of the short month ; that being so the plaintiff's second period of imprisonment for fourteen began on the 1st of December and ended the 14th of that month.

BRETT, L.J.: I am of opinion that the term a calendar month is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days ; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one.

COTTON, L.J.: I am of opinion that Denman, J., was clearly right in dealing with this question as a matter of law ; it is not a question of measurement of time, but of the technical meaning of the words "calendar month." Prisoners cannot always be imprisoned during one particular calendar month, in the sense of a month the name of which is to be found in the calendar. What then is the meaning of the term when the sentence begins otherwise than at the first day of a calendar month ? Although there are difficulties, I am of opinion that the right rule is that which has 239] \*been laid down by Denman, J., and the other members of this court. The imprisonment ends at 12 o'clock on the day immediately preceding the day in the following month corresponding to the day on which the imprisonment began. If there are not enough days in the second month to satisfy this rule the calculation is made in favor of the prisoner, and he will be liberated on the last day of the month. Thus the prisoner sentenced to a calendar month's imprisonment, will never be imprisoned for a greater number of days than there are in the month in which he was sentenced.

*Judgment affirmed.*

Solicitors for plaintiff : *Gold & Son.*

Solicitors for defendants : *Nicholson & Herbert.*

See 29 Eng. Rep., 432 note.

The question as to when a sentence commences and when it ends, arises in several classes of cases.

1. As to whether it commences upon its imposition or not until actual incarceration in the particular prison to which the convict is sentenced.

2. Where the convict after sentence

escapes and is recaptured—whether the period he is at large is to be included in the computation in determining when the sentence expires.

If a sentence have been imposed, the court may *at the same term*, and before the sheriff has proceeded to execute it, vacate it and impose a new sentence.

See 16 Am. Law Reg. (N.S.), 661.

**English:** *Rex v. Fletcher*, Russ. & Ryan, 60; *Rex v. Wyatt*, Id., 230; 4 Hawk. Pl. Cr. (Leach's ed.), p. 473, ch. 48, § 20; 3 Burn's J. (30th ed.), 63, tit. Judgment.

See also *Armstrong's Case*, 1 Lewin, C. C., 273.

**Massachusetts:** *Com. v. Weymouth*, 2 Allen, 144.

**New York:** *Miller v. Finkle*, 1 Parker, 374.

**Ohio:** *Lee v. State*, 35 Ohio St. R., 113.

**Pennsylvania:** *Com. v. Brown*, 12 Phila. R., 600, 35 Leg. Int., 5, Quarter Sessions, Philadelphia.

See *Com. v. Keeper*, 57 Penn. St. R., 291.

Though not, if an execution of the sentence be commenced, or it be partially executed or satisfied: *Brower v. Rice*, 57 Maine, 55, 2 Amer. R., 11; *Ex parte Lange*, 18 Wall., 163; *Com. v. Foster*, 122 Mass., 317; *Com. v. Keeper*, 57 Penn. St. Rep., 291; *Com. v. Weymouth*, 2 Allen, 147; *Ex parte Myers*, 44 Mo., 279.

Imprisonment before conviction and sentence will not enure to the benefit of the criminal as part of his punishment: *People ex rel. Stokes*, 66 N. Y., 342.

Though after conviction it will: *People v. Lincoln*, 62 How. Pr., 412.

Where, after the commencement of the execution of sentence, the prisoner is admitted to bail, and is at large pending a writ of error, some cases hold the period of his being at large should be included, and others that it should not.

That it should:

**English:** See *Paley on Convictions* (5th ed.), 320.

**Florida:** *Miller v. State*, 15 Fla., 575.

**Missouri:** *Ex parte Myers*, 44 Mo., 279.

**New York:** See *People v. Folmsbee*, 60 Barb., 486; *People v. Restell*, 3 How., 251, 254; *People v. Lohman*, 2 Barb., 456-7; *Lowenberg v. People*, 27 N. Y., 350-1; *People v. Lincoln*, 62 How. Pr., 412, 2 N. Y. Rev. Statutes, 741, § 24, 2 Edm. St., 766; 2 R. S., 740, §§ 16-21; 2 R. S., 742, § 29.

**North Carolina:** *State v. Gaskins*, 65 N. C., 320.

That it should not:

**New York:** *People ex rel. King v. McEwen*, 62 How. Pr., 226.

30 ENG. REP.

But see *People v. Lincoln*, 62 How. Pr., 412.

Where a prisoner escapes and remains at large for a time, he must, by the common law, serve after his recapture for a period equal to that part of his term of sentence which had not yet run at the time he escaped: 1 Bish. Crim. Proc. (3d ed.), §§ 163, 1382-5, 3 Crim. Law Mag., 206 note.

**English:** *Barrington's Case*, Select Crim. Trials, App., p. 20.

**Indiana:** *Matter of Clifford*, 29 Ind., 106; *State v. Wamin*, 16 id., 357.

See *Flora v. Sachs*, 64 Ind., 155.

**Kansas:** *Hollen v. Hopkins*, 21 Kansas, 638.

**Massachusetts:** *Dolan's Case*, 101 Mass., 219; *Com. v. Mott*, 21 Pick., 492, 2 Law Reporter, 47.

**New Jersey:** *Matter of Edwards*, 43 N. J. Law, 555, 5 N. J. Law J., 86, 25 Alb. L. J., 68, 3 Crim. Law Mag., 201, 206 note.

**New York:** *Haggerty v. People*, 6 Lans., 332, 53 N. Y., 476; *People v. Potter*, 1 Park. Cr. R., 47, 4 Leg. Obs., 177, 1 Edm. Select Cases, 235, 250-6; *Laws 1874*, ch. 451, § 10, p. 598.

**North Carolina:** *State v. Cockerham*, 2 Ired., 204.

**Virginia:** *Cleek v. Com.*, 21 Gratt., 777.

After the decision of *Haggerty v. People* (53 N. Y., 476, 6 Lans., 332), and the prisoner had served out the second sentence imposed upon him, for burglary (*Haggerty v. People*, 6 Lans., 347, 53 N. Y., 642), if it commenced at the beginning of his second imprisonment and he were not first held for the period of his escape from the first, he sued out a *habeas corpus* for his discharge, on the ground that the warden of the prison had no right to first detain him for the unexpired term of the sentence from which he had escaped, and therefore the second imprisonment began on his return to the prison.

His motion was denied and he was remanded.

Though the proceeding was before a county judge, it is believed to be sufficiently interesting to justify its insertion here:

"Before Hon. Geo. M. Beckwith, county judge, Clinton county, Aug. 5, 1874.

1879

Migotti v. Colvill.

THE PEOPLE, *ex rel.* Thos. Haggerty, v. STEPHEN MOFFIT, Warden, etc.

*Facts.* This is an habeas corpus to the warden of Clinton prison, requiring him to show cause why he detains the relator.

To this the warden returns:

1. That at the Albany sessions, in September, 1868, the relator was indicted for robbery in the first degree.

2. That on the 18th of September, 1868, the relator was duly convicted in said court, of robbery in the second degree, and sentenced to confinement in the Clinton prison, at hard labor, for three years.

3. That a certified copy of the minutes of said conviction and of the indictment are annexed to the return marked 'A.'

4. That the relator was duly committed to said prison under such sentence under a transcript of the entry of such conviction, a copy whereof is annexed to the return marked 'B.'

5. That on the 14th day of October, 1869, while confined in said prison, Haggerty escaped, and remained at large until the 14th day of March, 1872.

6. That at the January term of the Albany oyer and terminer, 1872, Haggerty was indicted for burglary in the third degree, committed by him while so at large,—was duly arraigned and pleaded not guilty,—whereupon the indictment was sent to the Albany sessions for trial.

7. That on the 18th of March, 1872, Haggerty was duly tried in the latter court on such indictment, convicted, and sentenced to two years confinement in the Clinton prison, to commence at the expiration of the first term of imprisonment to which he had been adjudged as aforesaid.

8. A certified copy of the record of conviction on this last indictment is annexed to the return (Exhibit 'C'), and concludes: 'and it appearing and being known of record to the said judge and justices that said Thomas Haggerty, prior to the commission of the felony and burglary in the indictment aforesaid above specified, had been duly and legally convicted of another offence and felony and sentenced to be imprisoned at hard labor in the State prison at Clinton, and committed there to pursuant to such sentence, but had escaped therefrom before the expira-

tion of the term for which he was so sentenced, and gone at large whithersoever he would, and hath ever since continued so at large; it is considered, adjudged, and determined by the said judge and justices, that the said Thomas Haggerty, for the felony and burglary aforesaid, in the indictment aforesaid, above specified, be imprisoned at hard labor in the State prison at Clinton, for the term of two years, to commence at the expiration of the first term of imprisonment to which he has so been adjudged.'

9. It may be stated historically that Haggerty brought a writ of error from this judgment and conviction, when it was affirmed by the Supreme Court (6 Lansing, 347), and ultimately on error to the Court of Appeals was affirmed by that court (53 N. Y. R., 642).

10. The return further shows that, after Haggerty escaped as aforesaid, he was never returned to said prison until June 4, 1872, when he was returned under both sentences, a transcript of the entry of the second conviction being annexed to the return marked 'D,' which, among other things, contains the following clause: 'This court \* \* \* do sentence and adjudge that the said Thomas Haggerty be imprisoned at hard labor in the State prison at Clinton for the term of two years; this sentence is to take effect at the expiration of the unexpired term of one year, eleven months and four days, on a sentence heretofore passed on said defendant Thomas Haggerty.'

11. It should further be stated historically that, prior to Haggerty's trial for burglary, certain proceedings were had in the Albany sessions to remand him in execution of the remainder of the first sentence, for robbery, when he was so remanded. He brought a writ of error to the Supreme Court, where the proceedings were affirmed (6 Lansing, 332); the Court of Appeals held them unauthorized, but dismissed the writ of error to that court (53 N. Y. R., 476).

His detention is not claimed by virtue of these proceedings, although, as the writ of error was dismissed, the determination of the sessions technically is unreversed.

*Jacob H. Clute*, for relator.

*N. C. Moak* (District Attorney of Albany county), for warden.



GEORGE M. BECKWITH, County Judge:  
I. In my opinion the relator could be and was lawfully held by the officers of the Clinton State prison, after his return to it in March, 1872, on the sentence and commitment for robbery, until he had suffered the full punishment of three years' imprisonment, notwithstanding the three years from the time when that sentence was pronounced had expired. The manner of his recapture and return to the prison is of no consequence. Having obtained possession of his person, they could hold him, on and by virtue of the judgment in the case, for robbery, until he had suffered the full punishment awarded against him for that offence.

My reasons for such opinion are briefly these: 2 R. S., 678, § 57, provides that "Every person convicted of robbery in the first degree, *shall be punished by imprisonment* in a State prison for a term not less than ten years; and every person convicted of robbery in the second degree shall be *punished* by a like imprisonment for a term not exceeding ten years." By the act of March 25, 1865, the terms of imprisonment were shortened, but in other respects the above provision of the Revised Statutes remains in force.

The court before which the offender is tried and convicted fixes the term of punishment. When the judgment is valid and regular, and the term of punishment is fixed by an entry of the sentence, the above mentioned statute applies to it, and it becomes the law of the case. The court may undoubtedly correct an error in its judgment, if it is done at the same term and before the sheriff has proceeded to execute it (1 Parker, 374). The punishment cannot be otherwise shortened, except by an act of the legislature or by the pardon of the governor, or by an allowance for good conduct. Much less can the offender by his own wrong, and such wrong a felony, lessen the punishment which the statute requires to be inflicted. I speak of a judgment in the obtaining of which no irregularity or error exists. Hence the relator was, in my opinion, legally held on the judgment for robbery after his recapture and return to the prison, although more than three years from the time such sentence was pronounced had expired. The time that he was at large after his

escape constitutes no part of the term of punishment by imprisonment which the statute requires to be inflicted. Such is my opinion, notwithstanding the provision or language of 2 R. S., 685, § 20.

II. The difference in language between the judgment of the court and the last clause of the commitment does not, in my judgment, render the commitment void. To authorize the discharge by habeas corpus of a prisoner held, or claimed to be held, on a conviction and sentence for a criminal offence, the proceedings by which he is so held, or claimed to be held, must be void. It is not enough that they are voidable. If a judgment or other proceeding be voidable only, it can be set aside by the court in which the irregularity complained of was committed.

I do not mean to say that it was irregular for the clerk to state the unexecuted portion of the sentence of imprisonment in the case for robbery. But if irregular and unauthorized by the judgment, I do not see any reason for holding that it vitiates that part of the commitment which states correctly the sentence of imprisonment for two years. Nor do I see how the relator, if there is any error in that last clause of the commitment, or if it is unauthorized, can be injured by it; for on the return of a habeas corpus, the court or officer before whom it was returned can go behind the commitment and look into the judgment to ascertain if it is authorized by the judgment, and hold that part which is not authorized by it void, and give full force to that part which conforms to the judgment. If on such investigation it should appear that there was no judgment, or a void one, then the commitment would fall and the prisoner be discharged, however formal the commitment might be; and if a portion of the sentence is unauthorized by the judgment, such portion only may be treated as a nullity.

The same remarks may apply to the judgment. If the court had no right to act on the knowledge it acquired in the proceedings that have been held to be void, and had no authority to add to the judgment of two years' imprisonment, to commence at the expiration of the first term of imprisonment, such addition can be treated as surplusage,

and the judgment of imprisonment for two years stand.

III. But it was insisted that the court before whom the relator was tried for burglary could not, and did not, legally know that the relator had been before tried, convicted, and sentenced for robbery and had escaped from his imprisonment before the expiration of the first term of his imprisonment had expired, and, therefore, the court had no right to add to the imprisonment for two years, that it should commence at the expiration of the first term of imprisonment for robbery.

In the proceedings on the information, the evidence to establish those facts had been given. Those proceedings have been held to be void, yet I can see no good reason for holding that such evidence taken before the same court, although the information and the proceedings on it are void, could not be used to enlighten the conscience of the court when called upon to pronounce the judgment of the law. The evidence was legal evidence to establish the former conviction and escape and going at large before the term of imprisonment had ended, and although the proceedings in which such evidence was given were void, that did not destroy the character of the evidence. The court had become possessed of a full knowledge of the facts, and I think could properly act upon it, when they pronounced judgment in the second case.

IV. It is also insisted, on the part of the relator, that the sentence for burglary commenced to run when it was pronounced, March 14, 1872, and that when he was returned to the custody of the officers of the Clinton prison, the unexpired term of his imprisonment on the first sentence for robbery also commenced to run. That both terms were served out when the two years from March 14, 1872, ended.

That position presents the most difficult question in this case.

It is provided by 2 R. S., 700, § 11, that 'when any person shall be convicted of two or more offences, *before sentence shall have been pronounced upon him for either offence*, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the ter-

mination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second term of imprisonment, as the case may be.' The revisers in their note to that section say: 'New in form; generally declared in the sentence; but as it may be omitted, it is deemed useful to provide for it by law.'

The question is not, can a prisoner under a sentence to a state prison, who has not served out the term of his imprisonment, be tried, convicted, and sentenced for a second offence, while the first sentence remains in force. There is no doubt he can be so tried, and if convicted, be sentenced. But the question is, can the court sentence him while he is under a sentence that is in force against him, to be imprisoned, and make the imprisonment commence at a future day, that is, at the expiration of the first term of his imprisonment, which has not been fully executed at the time of the second trial and sentence. The relator, when he was tried for the burglary and sentenced to two years' imprisonment, was then under a sentence for robbery on which he had been imprisoned for one year and twenty-six days, and an unexpired portion of the time of his imprisonment, to wit: one year, eleven months and four days remained to be executed.

Section 11, above referred to, does not speak of two or more convictions *at the same term* of the court, but of two or more convictions *before sentence on either*. That at first view seems to limit the court to the case, when the two or more convictions are had before sentence in either case, and impliedly to take from the court the power to pass a sentence to commence at the end of the first term then unexpired, when a sentence had been pronounced, and remained unexecuted in part, on a conviction had before the second conviction.

But from a careful examination of the statute and the authorities, most of which will be found collected in the cases of *The People v. Haggerty* (6 Lansing, 332 and 347, and in 53 N. Y., 476), I have come to the conclusion that the court possessed the power, independent of the statute, to pronounce the judgment it did in the case for burglary, sentencing the relator to two years im-

prisonment, to commence at the end of the first term of imprisonment, for the robbery.

Where a prisoner, while he is under a sentence of imprisonment, which has not been fully executed, commits a second offence, he may be tried, convicted, and sentenced for the second offence, and, I think, the imprisonment may be adjudged to commence at the termination of the punishment for the first offence. It seems to me that 2 R. S., 700, § 11, does not provide for such a case, and was not intended to provide for the case of a second offence committed *after the conviction and sentence for the prior offence*. It was only intended to cover the case where the offences were all committed before the trial, conviction and sentence in the first case or in either, and not to offences committed after the first conviction and sentence.

If the second or third offence is perpetrated before a conviction and sentence for the first offence, then I think it doubtful whether the court can adjudge that the imprisonment for the second or third offence shall commence at the end of the first imprisonment, except in the cases and as provided for in the 11th section above referred to.

The cases intended by that section of the statute, in my opinion, are cases where all the crimes were committed before a conviction and sentence for either, and not for offences perpetrated after conviction and sentence for a prior crime. I do not think that section was intended by the legislature to abridge or deprive the court of any of the powers it possessed when that provision was adopted, except, perhaps, to require the suspension of the judgment, after the first conviction, when a person stands indicted for two or more offences, until after a conviction on the other indictment or indictments, before pronouncing sentence in the first case; and if the sentence is not so suspended, then it impliedly takes from the court jurisdiction to make the term of imprisonment on the second or third convictions to commence at the termination of the prior term of imprisonment.

I have, therefore, come to the conclusion that the judgments and commitments in both cases are not void but valid; and that the term of im-

prisonment of the relator for the burglary has not yet expired.

He must be remanded."

Haggerty, after serving out the full period of both sentences, while attempting to break into and rob the New York Central Railroad depot, at Cohoes, on the night of December 15, 1876, was shot, mortally wounded, and died the next day: See Albany Evening Times, Dec. 15, 16, 1876.

Where the sentence in a felony case is imprisonment for a certain term, and the term elapses without the imprisonment being endured, the convict can be at any time afterwards brought before the court and a new date specified at which the term of imprisonment shall begin: Matter of Bell, 56 Miss., 282.

A prisoner who has been convicted of murder and sentenced to be executed, will not be discharged on habeas corpus because the sheriff has permitted the day assigned for the execution to elapse. A new day will be assigned: Matter of Nixon, 2 South Car. (N.S.), 4.

As to proceedings to enforce an unsatisfied sentence or to return an escaped convict, see 1 Bish. Cr. Proc., §§ 1382-5.

See form of proceeding, Haggerty v. People, 6 Lansing, 332-344; 53 N. Y., 477-8.

The New York courts however, hold no proceedings should be had; that the escaped convict should be returned to the imprisonment from which he escaped; and, if he desire to test the legality of his imprisonment, should be allowed to do so on *habeas corpus*: Haggerty v. People, 53 N. Y., 471, reversing 6 Lans., 332.

The writer having been "convinced" by the Court of Appeals, in Haggerty v. People, 53 N. Y., 471, "against his will," while he concedes the law in New York to be as laid down in that case until it shall be "distinguished," agrees with Mr. Bishop that the proceeding to enforce unexpired sentences was *not* limited to capital cases, and that elsewhere the safe method for wardens and custodians of escaped prisoners is to procure an adjudication that the unexpired portion of the sentence be enforced. Otherwise the position of the warden,—indictment for misfeasance if he refuse to enforce the sentence, and civil liability to the convict if he err,—is worse than that of the convict. He

1879

Reuter v. Sala.

has ample remedy to obtain a judicial determination to protect himself, while the innocent warden has none, and may be ruined by a verdict for false imprisonment if he err. Even if successful, he is almost certain to be cast in the costs and expenses of his own defence.

If a prisoner escape, the court will not entertain an appeal or other proceedings until his recapture or return into custody, so that the adjudication of the court can be enforced: 3 Crim. Law Mag., 208 note.

**California:** State v. Redinger, 1 Cr. Law Mag., 751, 55 Cal., 290, 5 Pacific Coast L. J., 698.

**English:** Rex v. Gibson, 2 Strange, 968, Hardw., 50; Rex v. Buckeridge, 2 Showers, 297.

**Kentucky:** Wilson v. Com., 10 Bush, 526.

**Louisiana:** State v. Marion, 15 La. Ann., 495.

**Massachusetts:** Com. v. Dowdican, 115 Mass., 183.

**Mississippi:** Hamilton v. Flowers, 56 Miss., 14; Matter of Walker, 53 id., 366.

**New York:** Matter of Genet, 3 Thomp. & Cook, 734, 1 Hun, 292, 59 N. Y., 80.

**Texas:** Gresham v. State, 1 Texas App., 458; Moore v. State, 44 Tex., 595; Brown v. State, 5 Tex. App., 126.

**United States:** Smith v. U. S., 94 U. S. Rep., 97.

**Virginia:** Leftwick v. Commonw., 20 Gratt., 716.

Cumulative sentences may be imposed, to commence at expiration of former terms: Toliver v. State, 35 Ark., 395.

See Kennedy v. Howard, 74 Ind., 87.

Where one under conviction and sentence for felony commits a crime, he may be tried and convicted thereof: Kennedy v. Howard, 74 Ind., 87.

[4 Common Pleas Division, 239.]

April 9, 1879.

[IN THE COURT OF APPEAL.]

REUTER, HUFELAND & CO. V. SALA & CO.

*Sale of Goods—Contract, not divisible.*

The plaintiffs contracted to sell to the defendants twenty-five tons (more or less) Penang pepper, October *and/or* November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading.

Within the stipulated time the plaintiffs declared twenty-five tons by a vessel called the B., only twenty tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper:

*Held* (by Cotton and Thesiger, L.JJ., Brett, L.J., dissenting), that the contract was entire, and that the defendants were not bound to accept the twenty tons, but were entitled to insist upon the delivery of twenty-five tons according to the contract.

ACTION brought to recover damages for the non-acceptance of twenty-five tons of pepper under a contract made by Moon, Bower & Co., brokers, on behalf of the plaintiffs with the defendants.

The contract was as follows:

*London; December 9, 1876.*

Sold for account of Reuter, Hufeland & Co., about twenty-five tons (more or less) Penang black pepper, October *and/or* 240] November shipment \*from Penang to London, per sailing vessel or vessels, at (4 $\frac{1}{4}$ d.) four pence and three-

sixteenths of a penny per lb. for the sound portion thereof with an allowance of  $\frac{1}{16}$ d. per lb. for first-class sea damaged,  $\frac{3}{16}$ d. per lb. for second-class sea damaged, and  $\frac{1}{4}$ d. per lb. for third-class sea damaged, and re-packed; guaranteed fair merchantable quality; if inferior, fair allowances to be made. To be landed and worked as usual at seller's expense. The name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading; but should the vessel or vessels which may apply to this contract be lost before declaration, this contract to be cancelled, as far as regards such lost vessel or vessels, on the production of the bill or bills of lading by sellers as soon as fairly possible after the loss is ascertained. Should the vessel or vessels, and the pepper or any portion thereof be lost, this contract to be cancelled for the whole or such portion; but should the vessel or vessels be lost, and the pepper or any portion thereof be transhipped to some other vessel or vessels, and arrive on account of the original importers, this contract to stand good for the whole or such portion. Customary allowances and conditions. Any dispute arising out of this contract to be settled by arbitration in the usual manner. Prompt three months, for final day of landing. Deposit £20 per cent. and difference on presentation of weight notes. No discount. Moon & Bower.

The remaining facts of the case fully appear in the judgments of the court.

The trial took place before Lord Coleridge, C.J., without a jury, in London during the Trinity Sittings, 1878, and after time taken for consideration, Lord Coleridge, C.J., directed judgment to be entered for the defendants, on the ground that the plaintiffs not having declared the whole of the pepper according to the contract, within the stipulated time, they had not fulfilled their part of the contract.

The plaintiffs appealed.

March 6. *Benjamin, Q.Q., Pollard (Morgan Howard, Q.C., with them)*, for the plaintiffs, contended that the contract was not an entire contract, but was divisible; and that the declaration was \*good as to twenty tons. They [241 relied on *Brown v. Muller* (1); *Brandt v. Lawrence* (2); *Bowes v. Shand* (3).

*Cur adv. vult.*

(1) Law Rep., 7 Ex., 319; 3 Eng. Rep., 429. (2) 1 Q. B. Div., 314; 16 Eng. Rep., 389.

(3) 2 App. Cas., 455; 20 Eng. Rep., 80.

March 7. *W. Williams, Q.C., and J. C. Mathew*, for the defendants, contended first, that the contract was not divisible; secondly, that the declaration of twenty-five tons was not one which they were bound to accept, as five tons had not been shipped according to the contract.

*Cur. adv. vult.*

April 9. The court having differed in opinion, the following judgments were delivered:

THESIGER, L.J.: This is an action brought by the plaintiffs as sellers against the defendants as buyers for the non-acceptance of about twenty-five tons of black pepper shipped from Penang to London. The defendants refused to accept any portion of the pepper, while the plaintiffs have contended in this court that the defendants were either bound to accept and take delivery of the whole, or at least were bound to take delivery of a portion, amounting to about twenty out of the twenty-five tons.

The contract between the parties was made on the 29th of December, 1876. [The Lord Justice read the contract.]

On the 19th of January, 1877, the plaintiffs, purporting to act in pursuance of the contract, declared by a vessel called the *Borga* 500 bags of black Penang pepper, which would be equal in weight to about twenty-five tons, in three parcels, the subject of separate bills of lading—namely, 285 and 110 bags under bills of lading dated the 29th of November, 1876, and 105 bags under a bill of lading dated the 11th of December, 1876. In answer to the declaration, the defendants by letter requested information as to the date of the shipment of the pepper. On the 22d of January, 1877, they repeated the request; and on the 24th of January, 1877, having in the meanwhile received no information as to the date of shipment, the defendants asked whether the declaration or, as they called it, the tender of the 19th of January was final or not, and were answered on the same day [242] that it was. On the 25th and 26th of January the defendants again inquired as to the date when the whole of the pepper was shipped; and on the 27th of January Messrs. Moon, Bower & Co., acting for the plaintiffs, wrote to the defendants, "We beg to acknowledge receipt of your memo. of yesterday's date, and are at a loss to know what you want. We have already furnished you with dates of bill of lading, which in declaration is always considered sufficient." To which letter the defendants replied on the same day, "Pepper contract. 29/12/76. We have your memo. of this day. By furnishing us with dates of bill of

lading you only fulfil one part of your contract; but the most important for us is the date of shipment, which, according to the contract, ought to have been made at the latest during November. We want then to know if you tender the said 500 bags as being all shipped during November."

Upon the same day an interview took place between the parties, with the object, so far as the plaintiffs were concerned, of learning whether the defendants would accept the declaration, but nothing definite passed. In point of fact, the shipment of the 105 bags under the bill of lading of the 11th of December, 1876, had not been made until the month of December; and on the 30th of January, 1877, the defendants wrote to the effect that they did not accept the declaration, as it was not for the full quantity according to the contract terms. Upon the 31st of January, the plaintiffs, through Messrs. Moon, Bower & Co., proposed by letter an arbitration to decide whether their tender or declaration constituted a fair delivery against the contract; and in answer to that letter the defendants, on the 2d of February, wrote as follows: "If the pepper you tender is all of November shipment at latest, there is nothing to arbitrate upon, and the contract would be in order so far. If any portion of what you have tendered is not November shipment at latest, we reject said tender entirely, and refuse to arbitrate, as the contract has not been fulfilled by you."

On the 5th of February the plaintiffs substituted for the declaration of the 105 bags by the Borgia under bill of lading of the 11th of December, 1876, a declaration of a similar number of bags by the same vessel under a bill of lading of the 29th of November, 1876; but this declaration being made more than sixty \*days after the date of the bill of lading [243 to which it referred, the defendants on the same day wrote as follows: "We have your memo. of this date, and do not admit your tender. If even other reasons did not exist, as you will find by previous correspondence, your tender aforesaid would be out of date." Some correspondence then passed between the parties, upon which, coupled with what passed before and at the interview on the 27th of January, the plaintiffs found a contention that either the stipulation as to time of declaration was waived, or the defendants, by their conduct, had misled the plaintiffs into a belief that the breach of the stipulation would not be relied on, and were estopped from setting up such breach. It does not seem to me that this issue, which would be one peculiarly suitable for a jury, was really intended to be tried, or indeed was

1879

Reuter v. Sala.

tried, when the parties dispensed with a jury and took the case before Lord Coleridge, C.J., alone, and it is not mentioned in his judgment. But assuming it be open to the plaintiffs, I am of opinion that the evidence wholly fails to support their contention. I gather from the evidence that down to the time that the declaration was finally rejected, both the parties were standing upon their strict rights, and the plaintiffs had due warning from the defendants that they at least were doing so; and I can see no ground for the imputation that the defendants wrongfully induced the plaintiffs to believe that time was or would be waived, or did anything which could be construed into a waiver or its equivalent.

I revert again to the evidence. In a letter of the 2d of June, Moon, Bower & Co., as the plaintiffs' agents, "advise the arrival of the *Borga* from Penang, in which vessel you are interested, as per contract dated 29th December." To that letter the defendants, on the 7th of June, replied: "*Borga*.—We have your memo. of the 2d instant advising arrival of the above vessel. By our previous memorandums, which we now confirm, you will find that we rejected your tender of pepper by this vessel."

On the 26th of June samples of the pepper which was included in the declaration on the 19th of January, as altered by that of the 5th of February, and all of which was a November shipment, were tendered. The defendants rejected the whole of these samples, and this action was then brought.

I have already stated my opinion that there was no waiver 244] of \*the time within which the declaration was to be made, and no conduct of the defendants estopping them from setting up the breach of the stipulation in regard to time, and it follows that the declaration not being in time, as regards five tons, the plaintiffs cannot maintain their action for the non-acceptance of the whole twenty-five tons.

The argument before us has, however, been mainly directed to the question whether the plaintiffs can maintain this action in respect of the twenty tons. I am of opinion that they cannot do so. The subject of the contract is the sale of a specific quantity of a given article, with a margin for a moderate excess in or diminution of that quantity under the words "about" and "more or less."

The rule applicable to such a contract, if it were not qualified by other provisions, would be that, subject to the moderate margin, the sellers cannot call upon the buyers to



accept any greater or less quantity of the article bargained than the specified quantity.

In the present case if the five tons shipped, or declared too late, be excluded, the diminution in quantity is clearly beyond the margin. But the contract also provides that the shipment is to be "per sailing vessel or vessels, and that the name of the vessel or vessels, &c., is to be declared within sixty days of the bill of lading." Founding their argument on these provisions, the plaintiffs contend that they were entitled to call upon the defendants to accept delivery of any substantial portion of the pepper, whatever might be their position or declared intentions as regards the remainder, and they rely upon the decision of *Brandt v. Lawrence* <sup>(1)</sup> in support of this view. The defendants, on the other hand, contend that they were not bound to accept anything less than the whole of the pepper, subject to a moderate margin, except in the case of loss of vessel or vessels and pepper expressly provided for by the contract; or at least, that under the circumstances of this case they were not so bound. I do not accede to the defendants' contention, so far it rests on the provisions of the contract relating to the loss of vessel or vessels and pepper; for these provisions are in my opinion inserted *alio intuitu*. I think that they were intended to protect the sellers from any action for \*non-delivery caused by the happening of the contin- [245 gencies provided for. But I am of opinion that the defendants' contention is otherwise well founded. *Brandt v. Lawrence* <sup>(1)</sup> was a case where Russian oats were sold under a contract by which the shipment was to be by steamer or steamers in a particular month, conditionally upon ice at loading port not preventing it, in which event shipment was to be made immediately after the opening of the navigation. Payment was to be made in respect of any shipment by cash on receipt of, and in exchange for shipping documents. Under this contract a portion of the oats, together with other oats the subject of another contract, was shipped, in consequence of ice, after the specified month, but immediately after the navigation was opened, and was refused by the defendants on the ground that the shipment had been made too late. At the time of this refusal the sellers were acting in strict accordance with their contract, and there was nothing to indicate that the contract would not be performed by them in its entirety. Afterwards, and beyond the time allowed by the contract, the remainder of the oats were shipped, and were also, but in this case rightly, refused.

<sup>(1)</sup> 1 Q. B. D., 344; 16 Eng. R., 389.

1879

Reuter v. Sala.

In an action for non-acceptance of both parcels of oats the facts were proved as above stated, and a verdict having been found for the plaintiffs in respect of the first shipment, a motion for a new trial was refused both in the Queen's Bench Division and on appeal in this court.

But in the present case the facts are very different. In the first place, the declaration of the pepper named but one ship, and the pepper tendered did in fact arrive by one ship. In the second place, there has not been at any time either a declaration or a tender of the twenty tons of pepper which the plaintiffs contend that the defendants are bound to accept, apart from the five tons which, upon this branch of the case, they admit that the defendants were not bound to accept. The matter seems to stand thus: if the declaration of the 19th of January be relied upon, then the plaintiffs indicated by that declaration their intention of calling upon the defendants to accept under the contract of the 29th of December, 1876, twenty-five tons of pepper, five tons of which were not of October or November shipment. If the 246] declaration of \*the 5th of February be relied upon as severing those five tons from the remainder, and cancelling the previous declaration made of the twenty-five tons, then it is clear that it at the same time added another five tons, which the defendants were equally not bound to accept, inasmuch as the sixty days within which the declaration was to be made had expired, and even if those five tons had not been added, the declaration of the twenty tons as a separate parcel would seem only to date from that day, and would, therefore, also be too late. But the plaintiffs endeavored to displace these positions by the argument that, as the pepper tendered was shipped under three separate bills of lading, and was so declared, the declaration and tender, although one in fact, may be treated as separable in law, and consequently that the defendants were bound to accept the twenty tons, which, upon this hypothesis, were properly declared and tendered.

I cannot assent to this argument. In mercantile contracts like the present, the making within a given time of a declaration or declarations upon which the buyers may act, is an essential feature of such contracts: and further, although the sellers have an option to ship the article contracted to be sold, either by one or more vessels, and the provision in the contract to that effect may give, as, according to *Brandt v. Lawrence* <sup>(1)</sup>, it does give, the sellers a right to call upon the buyers to accept any portion of the quantity contracted to

(1) 1 Q. B. D., 344; 16 Eng. R., 389.

be sold, which has been shipped and declared in accordance with the contract, and as a step towards its entire performance, it does not appear to me, by any means, to follow that the quantity named in the contract is not still of the essence of the contract, and if it be so, the case is, in this respect, distinguishable from *Simpson v. Crippin* <sup>(1)</sup>, and cases of that class, where each delivery of coal was really like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties might well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract. But, however this may be, the present contract ought and must, in my opinion, at least, involve this consequence, namely, that where the sellers elect to ship by one vessel the whole quantity contracted to be sold, and declare \*their [247 election to the buyers, still more when they follow up their election and declaration by tendering the whole quantity pursuant to their declaration, they cannot, after it is discovered that as to a portion of the quantity shipped it was not shipped in accordance with the terms of the contract, and that the buyers are not bound to accept that portion, turn round and call upon them to accept the remaining portion of the quantity shipped, which though physically separable, and the subject of distinct bills of lading, yet had always been treated by the sellers as part of one entire whole, which the buyers by the declaration were told to treat, and by the tender were called upon to accept, as one entire whole.

The matter may be made more plain by reversing the position of the parties. Suppose a declaration such as was made in this case on the 19th of January, and that the fact had been that all the then parcels had been shipped in accordance with the terms of the contract; suppose also that under such circumstances the defendants had, either at the time of declaration or when the pepper was tendered, expressed their willingness to take the twenty tons, but had absolutely refused to take the five, the plaintiffs might clearly have said, "We make this declaration or tender as a whole, and will only deliver the pepper comprised in it as a whole." If that be not so, where would the defendants' right of separation cease? They might, of course, take one only of the three parcels, and it is difficult to see on what logical or legal principle they might not demand to have some bags out of the one parcel, and say, "We will pay for the non-acceptance of the remainder in damages." This would re-

(1) Law Rep., 8 Q. B., 14; 4 Eng. R., 200.

1879

Reuter v. Sala.

duce the matter to a practical absurdity. But on the other hand, if the sellers' right would, under the circumstances supposed, be such as I have suggested, namely, the right to have the pepper accepted as a whole, and the consequent right of treating the contract at an end if the buyers refuse to accept it as a whole; surely the converse proposition must hold, namely, that where the shipment comprised in one declaration is in part good and in part bad, and although the good and bad parts are separable, yet the sellers adhere to the declaration as a whole and tender the shipment as a whole, the buyers must have a right to reject unconditionally both the \*declaration and the whole of the goods tendered under it: and, further, that the defendants would not be bound to accept the part of the shipment which in itself complied with the terms of the contract, if after the declaration and tender, and after it was apparent that the sellers' contract could not be performed in its entirety by delivery of the whole of the goods contracted to be sold, the sellers separated the good portion of the shipment from the bad, and made a fresh tender of the former for acceptance. Looking at the case from this point of view, it is really untouched by either the coal cases to which I have referred, or the decision in *Brandt v. Lawrence* <sup>(1)</sup>, and upon the grounds mentioned I arrive at the conclusion that the plaintiffs cannot maintain their action against the defendants in respect of any portion of the pepper which was the subject of their contract, and that the judgment of Lord Coleridge, C.J., should therefore be affirmed.

COTTON, L.J.: This was an action on a contract dated the 29th of December, 1876, whereby the defendants agreed to buy from the plaintiffs twenty-five tons of pepper, more or less, of October or November shipment, from Penang to London, per sailing vessel or vessels, the name of the vessel or vessels, marks, and other particulars, to be declared within sixty days from the date of the bill of lading.

On the 19th of January, 1877, the plaintiffs, by a letter addressed to the defendants, declared twenty-five tons of pepper shipped in several parcels on board the *Borga*. Of these twenty-five tons five had in fact been shipped in December, and were, therefore, not pepper which, according to the contract, the defendants were bound to take; and on the 30th of January the defendants declined to take the twenty-five tons. Afterwards, but after the expiration of the time within which the pepper was under the contract to be declared, the plaintiffs declared other five tons of pepper ship-

(1) 1 Q. B. D., 344; 16 Eng. R., 389.

ped in November on board the same vessel, in substitution for the five tons previously declared, but which were not shipped till December, and to which the defendants had a right to object. The vessel arrived in this country in June, and the defendants refused to take the pepper, hence the present \*action, and Lord Coleridge, C.J., decided in [249 favor of the defendants that they were not bound to take the twenty-five tons of pepper, or any part thereof.

The plaintiffs have appealed to this court. The first point urged by the plaintiffs was, that the defendants, before the expiration of the time within which, under the contract, the plaintiffs were to declare the twenty-five tons, had by their conduct either waived the condition as to time, or induced the plaintiffs to believe that the condition would not be insisted on, until it was too late for them to declare other five tons in substitution for that part of the twenty-five tons which were shipped in December, and, therefore, not in accordance with the contract. In my opinion this contention cannot be supported. It was for the plaintiffs to declare twenty-five tons of pepper of the quality and shipped at the time stipulated by the contract, and to do so within a limited time. The defendants were indeed asked, on the 27th of January, whether they insisted on the objection that five tons were not of October or November shipment, and they did not answer till the 30th of January. But there is really nothing to support the contention that this delay, if any, was intended to mislead the plaintiffs, and in the absence of evidence from which such a conclusion could be arrived at, we cannot relieve the plaintiffs from the stipulation as to time.

It was argued that the rules of courts of equity are now to be regarded in all courts, and that equity enforced contracts though the time fixed therein for completion had passed. This was in cases of contracts such as purchases and sales of land, where, unless a contrary intention could be collected from the contract, the court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable. We must therefore hold that the time within which the pepper was to be declared was an essential condition of the contract, and in such a case the decisions in equity, on which reliance is placed, do not apply.

But then it was urged, that the contract was divisible, and that the defendants were bound to take the twenty tons, that is to say, that although five tons was a difference which could not be covered by the words "more or less" under

1879

Reuter v. Sala.

250] this contract, the defendants \*would be bound to take and pay for any substantial portion of the twenty-five tons, which the plaintiffs might be ready and willing to deliver to them; and in support of this contention, reliance was placed on the words "per sailing vessel or vessels;" and it was argued that this showed that the contract was divisible. In my opinion, it has not this effect. These words did indeed show that the twenty-five tons might be delivered in several parcels, and possibly might arrive in England at different times. But this is very different from the contention that the defendants having stipulated for twenty-five tons, would be bound to take a small portion, say five tons, when the plaintiffs were unable or unwilling to supply the balance of the stipulated quantity. The contract in this case was in December, after the pepper must, in order to comply with the condition of the contract, have been shipped, and I think that the reference in the contract to "vessel or vessels," may well have been intended to obviate any difficulty arising from the circumstance of twenty-five tons, the required quantity of pepper, not having been shipped in one vessel. But I think that to enable the plaintiffs to require the defendants to take and pay for the pepper, there must be the twenty-five tons, though in different vessels. But it is urged that the decision in *Brandt v. Lawrence*(<sup>1</sup>) had given a judicial interpretation of these words, "per vessel or vessels," in a contract which would be otherwise entire and indivisible. I cannot consider the case of *Brandt v. Lawrence*(<sup>1</sup>) as laying down a general rule of construction, but merely as deciding that the contract in that case having regard to the words "vessel or vessels," was divisible. The contract is not stated at length in the report, but we have been furnished with a copy of it. There the contract was entered into before the shipment was under the contract to be made; and payment was to be made in cash on receipt of, and in exchange for, shipping documents. In that case the seller shipped in a vessel a portion of the oats, and tendered it to the buyer with a view to the supply of the entire quantity, and the whole of the oats in that vessel were oats which complied with the conditions of the contract as to quality and time of shipment, and the seller had therefore, under 251] the contract, a right to ask for the price in \*cash for this part of the entire quantity in exchange for the bill of lading. This is, I think, a substantial difference between the contracts in the two cases, and sufficient to prevent the construction put upon the contract in that case, affording

(<sup>1</sup>) 1 Q. B. D., 344; 16 Eng. R., 389.

authority for the decision in favor of the plaintiffs in the present contract. There is also a difference in the circumstances under which the plaintiffs in this action make their claim, for in the present case the plaintiffs have not severed or separated the twenty-five tons of pepper, which is the subject of the contract, in the only way contemplated by the contract, namely, by shipping it in different vessels; but have shipped in one vessel twenty-five tons of which they contended the defendants are bound to take the whole. I am of opinion, that the decision of Lord Coleridge, C.J., was correct, and must be affirmed.

BRETT, L.J.: In this case the facts which I consider material are that a contract of purchase and sale was entered into between the plaintiffs and defendants on the 29th of December, 1876. By it the plaintiffs sold to the defendants about twenty-five tons, more or less, Penang black pepper, October <sup>and/or</sup> November shipment, from Penang to London, per sailing vessel or vessels, at 4<sup>3</sup>/<sub>4</sub>d. per lb. The name of the vessel or vessels, marks, and full particulars to be declared to the buyers in writing within sixty days from date of bill of lading; but should the vessel or vessels which may apply to this contract be lost before declaration this contract to be cancelled as far as regards such lost vessel; should the vessel or vessels and the pepper, or any portion thereof, be lost, this contract to be cancelled for the whole or such portion, &c. Prompt three months from final day of landing. Deposit 20 per cent., and difference on presentation of weight notes. No discount. In fulfilment of this contract the plaintiffs, on the 19th of January, within sixty days of the dates of three respective bills of lading of pepper shipped on board a vessel called the Borgia, declared in one declaration three distinct parcels of pepper, all on board the Borgia.

Thus:—S B

B 285 bags—bill of lading dated 29th November.

C 110 bags—bill of lading dated 29th November.

F 105 bags—bill of lading dated 11th December.

\*Two of the parcels, which amounted to twenty [252 tons, were shipped and declared in accordance with contract; but the third parcel, although declared within due time after the date of the bill of lading, did not fulfil the contract, because it was not a November shipment.

The plaintiffs were asked whether this declaration, which both parties called a tender, was final, and answered that it was. On the 27th of January the plaintiffs asked whether

1879

Reuter v. Sala.

the defendants would accept the December shipment named in the declaration of the 22d of January. No definite answer was given. But on the 2d of February the defendants refused the whole on the ground that a part was not a November shipment. It is somewhat difficult to appreciate the legal effect of this refusal. I know of no legal obligation to accept or reject a declaration which is an act to be done solely by the seller, or of any legal effect to be given to an alleged refusal to accept a declaration. The highest effect which can be given to this refusal, at this time, is that it is a notice by the defendants that they do not accept the declaration as good for twenty-five tons.

On the 5th of February the plaintiffs wrote to substitute for the December shipment a November shipment, which was also on board the *Borga*. The date of the bill of lading of this lot was the 29th of November, that is, they offered a November shipment. But they made the offer or declaration more than sixty days after the date of the bill of lading. This was refused by the defendants. The *Borga* arrived in June. The plaintiffs then tendered three parcels of Penang pepper, all of November shipment, and amounting in all to twenty-five tons, being the two parcels of November shipment, declared on the 19th of January, and the one parcel offered or declared on the 5th of February, but which last was not declared within sixty days of the date of the bill of lading relating to it.

The defendants refused to accept any part on the ground, by reference to their formal letter as to the declaration, that they would not receive a part if offered, because the whole had not been declared according to contract. Upon this state of facts it is obvious that the declaration of twenty tons per *Borga* made on the 19th of January was a sufficient 253] declaration of twenty tons \*unless the declaration of so much was rendered nugatory by the wrong declaration of the other five tons, the December shipment. And it is equally obvious that after the 28th of January the plaintiffs could not make a valid declaration of any November shipment, so that on the arrival of the ship in June the plaintiffs could only tender as well shipped and also well declared twenty tons, and could not by any contrivance tender as well shipped and also well declared the other five tons. The plaintiffs did tender twenty-five tons. If the defendants had refused on the ground of having twenty-five tons offered to them, whereof they were bound to take only twenty tons, so that they left it open to be said that if the twenty tons had been offered to them they might have accepted them,



then the tender of the twenty-five tons must have been bad ; but the defendants did not take that point, they refused in terms which amounted to saying that they would not take the twenty-five tons, nor the twenty tons if offered, because they could not have the twenty-five tons shipped and also declared according to contract. This refusal seems to me to have absolved the plaintiffs from the necessity of tendering separately the twenty tons, and to oblige us to treat the case of liability as if the plaintiffs had tendered the twenty tons at the time when they tendered the twenty-five tons. The question is whether if the plaintiffs had tendered the twenty tons only, not being able to tender according to contract any five tons to make up the twenty-five tons, the defendants could have refused to accept the twenty tons. That raises, first, the question what is the proper construction of the contract ? In *Jonassohn v. Young* <sup>(1)</sup>, an action was brought for not accepting coals, the contract was that the plaintiff would sell and deliver to the defendant as many coals equal to a former sample cargo as a steamer called the Great Northern could fetch in nine months, proceeding to and from Sunderland, from and to London, backwards and forwards in successive voyages. The steamer to be sent by the defendant, and the plaintiff to ship the coals at 5*s.* 9*d.* a ton, payment at the beginning of each month for the preceding month's shipments, less 2½ per cent. discount. The defendant pleaded that in the first voyage the defendant shipped a cargo not equal to sample ; to this plea there was a demurrer. \*The failure of the first cargo was therefore [254 admitted. It was impossible that the plaintiff could by any subsequent deliveries satisfy the contract, if it was one and indivisible ; but the court held that the plea was bad because the breach by the plaintiff went only to part of the consideration. Now the consideration for the whole of the defendant's undertaking, which was of course the undertaking to accept and to pay for all which the plaintiff was to deliver, was that the plaintiff undertook to deliver all, and to deliver a cargo each time that the defendant should send the steamer. The judgment is that the failure to deliver the first cargo according to contract, though an incurable failure, did not absolve the defendant from the duty of accepting the subsequent cargoes, because the failure as to the first cargo was only a breach of a part of the consideration moving from the plaintiff.

Apply that case to the question raised in this. Here the whole consideration for the defendants' promise to accept

(1) 4 B. & S., 297.

1879

Reuter v. Sela.

the pepper was the plaintiffs' promise to deliver the whole twenty-five tons. The plaintiffs were ready and willing to deliver twenty tons, but failed by an incurable failure to be able to deliver the other five tons. The case cited answers that the failure of the plaintiffs is a breach of only a part of the consideration, and the defendants are not absolved from the duty of accepting the twenty tons. In *Simpson v. Crippin* (\*), the action was for non-delivery of coal, the defendants agreed to supply the plaintiffs with from 6,000 to 8,000 tons of coal, to be delivered into defendants' wagons at plaintiffs' collieries in equal monthly quantities during the period of twelve months from the 1st of July at 5s. 6d. per ton; terms, cash monthly less 2½ per cent discount. The plaintiffs failed to send wagons according to the contract in the first month, that was an incurable failure. Their part of the whole contract never could afterwards be fulfilled. The judge told the jury that, as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the defendants in point of law in cancelling the contract. "It cannot be denied," says Blackburn, J., "that the plaintiffs were bound in every month to send wagons capable of carrying at least 500 tons, and that by failing to perform this term they have committed 255] \*a breach of the contract, and the question is, whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of wagons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely on the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract." Apply that case to the present. The point taken on behalf of the defendants is, that by reason of the incurable breach as to the five tons, the defendants are entitled to rescind the contract as to the twenty tons. The answer is, no sufficient reason has been shown why damages would not be a compensation for the breach by the plaintiffs as to the five tons. In *Brandt v. Lawrence* (\*) the action was for non-acceptance of oats. By the contract the defendant bought of the plaintiff 4,500 quarters of Russian oats, at 23s. per delivered 304lbs., including freight and insurance to London. Shipment by steamer or steamers during February. Payment by cash on receipt of and in exchange for shipping documents, less interest at 5 per cent. for the unexpired portion

(\*) Law Rep., 8 Q. B., 14; 4 Eng. R., 200. (\*) 1 Q. B. D., 344; 16 Eng. R., 389.

of three months from date of bill of lading. In fulfilment the plaintiff tendered 1,139 quarters per Winsland. The defendant for a given reason refused to accept them. The plaintiff afterwards tendered the balance of quantity brought by a ship called the Oxford, but brought too late. At the time of action brought, therefore, the plaintiff had tendered in good time a part of the oats, but had never tendered, and never could tender, the balance within the terms of the contract, if treated as one and indivisible. It was argued for the defendant that the contract was an entire contract for the delivery of 4,500 quarters of oats within a specified time; it could not be split into parts; if the whole was not shipped in time, the defendant was entitled to reject the part which was in time. The Queen's Bench Division thought that this was not so, because the contract says, "shipment by steamer or steamers." In the Court of Appeal, Mellish, L.J., said, "I think the legal inference is that it was intended that the shipment should be made (which must \*mean might [256 be made) in different parcels, and that the purchaser was bound to accept them as they came if they were in time;" and, again, "was the purchaser bound to accept that part of the goods which was shipped in time? I am of opinion that he was, because the contract says that the shipment is to be made by steamer or steamers." That judgment was rested solely on the construction of the contract, no reliance was placed on any power of election by the seller to send by two ships instead of one. As the case stood, it was the same as if he had only shipped a portion by one ship, and had never shipped the other portion by any ship. The late shipment was no shipment according to the contract. Apply that case to the present. The contention here is that the defendants were not bound to accept twenty tons, because there was no shipment and declaration of five tons according to contract. The question is, were the defendants, the purchasers, bound to accept that part of the goods which was shipped and declared in time? The answer, according to the Queen's Bench Division, and on appeal in the case cited, is that they were, because the contract says that the shipment is to be—that is, may be—in "sailing vessel or vessels." Mellish, L.J., cited in that case the case of *Simpson v. Crippin* ('). It is obvious to my mind that he considered the case before him to be governed by that case, and that case was in its turn in terms founded on *Jonassohn v. Young* ('). The chief use of authoritative cases is to enable us to deduce, if we can, from them a general principle ap-

(') Law Rep., 8 Q. B., 14; 4 Eng. R., 200.

(') 4 B. &amp; S., 297.

plicable to succeeding similar, though not identical, cases. It seems to me that the general principle to be deduced from these cases is, that where in a mercantile contract of purchase and sale of goods to be delivered and accepted the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he never could fulfil his undertaking to accept or deliver the whole [257] of the specified quantity. The reasons \*given are that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part; that the other party should have been or should be always ready, and willing, and able to accept or tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts seems to me to fortify the one construction and condemn the other. Suppose, in the case of shipments, the seller has by contracts made abroad provided for all the successive shipments, and has taken up ships to proceed and call for the successive cargoes, and the first seller to him fails to fulfil his contract, so that the first shipment fails, the purchaser under the main contract we are discussing may, upon one construction suggested, throw up the whole contract, although he could be amply recompensed for the partial failure, and throw the loss of all the other purchases and charters upon the seller without any compensation. So if the purchaser has made contracts, and fails to take delivery of one parcel, the seller, although he might be amply compensated for the partial failure, would be entitled to ruin the buyer with regard to his forward contracts without any compensations. Again, suppose any one of the ships lost after a perfectly good shipment by several ships, either buyer or seller might at once cancel the whole contract, to the irreparable loss of the other party, although he himself might be amply compensated by a payment in damages; or suppose a seller to send all the stipulated quantity in one ship, and a jettison to have become inevitable on the voyage, he is to have the

whole of the remainder of the cargo left on his hands without compensation, although the buyer might easily be compensated for the short delivery. These considerations show that the rule of construction adopted by the courts is as sound on mercantile as it is on legal considerations, and all the considerations, both mercantile and legal, apply as much and as fully to the present contract as to those cited. The question of the time or mode of payment has nothing to do with the reasoning for or against either view; moreover, it is most important, in my opinion, that the \*construc- [258  
tion of mercantile contracts should be broad and large, and should not depend on refined logical deductions, or on slight variations either in the terms or the conditions of each particular contract. The contract, for instance, now before us differs as to the period and conditions of payment from that in *Brandt v. Lawrence* (<sup>1</sup>), but it differs very little as to the terms of payment from the other cited cases. That difference as to the periods of payment makes no difference in the reasons given for the decisions in those cases, in which the stipulation as to the payment was not noticed, and in *Brandt v. Lawrence* (<sup>1</sup>) it is not even reported.

I am of opinion that the plaintiffs are entitled to recover in respect of twenty tons, leaving the defendants to a cross action in respect of five tons.

*Judgment affirmed.*

Solicitor for plaintiffs: *John Rae.*

Solicitors for defendants: *Hollams, Son & Coward.*

(<sup>1</sup>) 1 Q. B. D., 344.

As to the meaning of the word "about," see 2 Chitty on Cont. (11th Am. ed.), 1060 note h.; *Morris v. Levi-son*, 16 Eng. R., 496; *Clapp v. Thayer*, 112 Mass., 296; *Hawes v. Lawrence*, 4 N. Y., 345; *Callmeyer v. Mayor*, 83 id., 116; *Harrington v. Mayor*, 70 id., 604, 10 Hun, 248, 251-2; *Turner v. Whedden*, 22 Maine, 121; *Woodruff v. Cook*, 25 Barb., 505; *Peck v. Mallams*, 10 N. Y., 509; *Creighton v. Comstock*, 27 Ohio St. R., 548; *Brawley v. United States*, 11 Court Claims R., 522, 532-3, 96 U. S. Rep., 163; *Hardy v. United States*, 9 Court Claims R., 244; *Bel-*

*knap v. Sealey*, 14 N. Y., 144; *Cabot v. Winsor*, 1 Allen, 546; *Pingree v. County Comm'rs*, 102 Mass., 76, 78; *Tarbell v. Bowman*, 103 id., 344; *Chapin v. Clarke*, 7 Grant's (U.C.) Chy., 75; *Wood v. Orser*, 25 N. Y., 348; *Moffet v. Sackett*, 18 id., 522; *Rea v. Holland*, 12 North Western Reporter, 167, Supreme Court, Michigan; *Lawson on Customs and Usage*, 377, 451; *Dos Passos on Stock Brokers and Stock Exchange*, 830; *Biddle's Law of Stock Brokers*, 87-9; *Benjamin on Sales* (2d Am. ed.), §§ 591, 691-2.

[4 Common Pleas Division, 267.]

April 2, 1879.

**267] \*FOULKES V. THE METROPOLITAN DISTRICT RAILWAY COMPANY.**

*Railway—Passenger—Ticket issued by One Company—Train of Another—Negligence—Liability of Carriers.*

The defendants, the Metropolitan District Railway Company, have running powers over the South Western Railway between Hammersmith and the New Richmond station of the South Western Railway Company. Above the booking office at the New Richmond station are the words "South Western and Metropolitan Booking Office and District Railway." The plaintiff took from the clerk there employed by the South Western Railway a return ticket to Hammersmith and back. The ticket was not headed with the name of either company, but bore on it the words "Via District Railway." On his return journey from Hammersmith to Richmond the plaintiff travelled with his ticket in a carriage of a train belonging to the defendants and under the management of their servants. The carriage being unsuited for the New Richmond station platform, the plaintiff, on alighting there, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them:

*Held*, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, even assuming the ticket not to have been issued by or for them, but by the South Western Company.

**ACTION for negligence.**

The claim alleged: that, 1. The defendants were carriers of passengers by railway between Richmond and Hammersmith for reward.

2. The plaintiff became and was received by the defendants as a passenger, to be carried by them from Hammersmith to Richmond for reward to the defendants.

3. The defendants, in breach of their duty, negligently provided an unsafe and improper carriage for the purpose of carrying the plaintiff, and omitted to provide him with a fit and proper carriage; that is to say, that the floor of the carriage which they provided was of so great a height above the platform at the Richmond station as to render it dangerous and unsafe for the plaintiff to get out of it, and no proper or sufficient step was provided to enable him to do so.

4. In addition to the breach of duty and negligence aforesaid, or in the alternative, the plaintiff alleged that the defendants, in breach of their duty in that behalf, negligently, 268] carelessly, and \*improperly provided an unsafe and improper platform and station at Richmond station; that is to say, that the platform at the Richmond station was at so great a distance below the floor of the carriage in which the plaintiff was a passenger as to render it unsafe and dangerous for the plaintiff to get out of the carriage.

5. By reason of the defendants' breach of duty, negligence, carelessness, and improper conduct aforesaid, the plaintiff, in alighting at Richmond from the carriage in which he was a passenger, fell or slipped forward out of the carriage on to the platform, and was hurt and permanently injured.

By the defence the defendant admitted paragraphs 1 and 2 of the claim, but denied that any such accident as was alleged in the 3d paragraph happened, or that the defendants were guilty of negligence, and pleaded contributory negligence on the part of the plaintiff.

Reply. Issue.

At the trial before Cockburn, C.J., at Westminster, it appeared that on the 5th of July, 1878, the plaintiff went to the New Richmond station on the London and South Western Railway, and there took a return ticket from New Richmond to Hammersmith and back. The South Western Railway runs from New Richmond to Hammersmith. The line, before reaching Hammersmith, divides into two branches, one of which runs to the Hammersmith Broadway station of the Metropolitan District Railway Company. That company have statutory running powers over the London and South Western line between the Broadway station and New Richmond. The plaintiff travelled by train to Hammersmith. He went thence to London and back. On his return he, availing himself of the return ticket, travelled from Hammersmith in a train of the Metropolitan District Railway Company, and under the management of their servants, to New Richmond station. The carriages were adapted to the Metropolitan District Railway stations, the platforms of which are nearly level with the floors of the carriages, but were not adapted to the New Richmond station, the platform of which was about 2 ft. 3 in. below the carriage floors. The plaintiff was accustomed to travel along the Metropolitan District Railway, but had not previously travelled by a train of that company from Hammersmith to New Richmond station. He arrived at that [269 station at 9.30 P.M.; no warning was given to him of the depth of descent from the carriage to the platform. Getting out of the carriage, he put his foot down, expecting to find a step or footboard to the carriages, slipped a little lower, found no footboard, and was unable to recover himself, both his legs passed down below the platform, and he fell on to it and was seriously hurt.

Some discussion took place at the trial as to the liability of the defendants; from their answers to interrogatories which were put in by the plaintiff, it appeared that on and

1879

Foulkes v. Metropolitan District Railway Co.

prior to the 5th of July, 1877, the defendant company carried passengers by their trains from Richmond to Hammersmith, and *vice versa*, but tickets issued at Richmond station were issued by the South Western Railway Company, and not by the defendants.

The Lord Chief Justice told the jury that, assuming for the purposes of the trial that the defendants contracted with the plaintiff, they would be answerable if the jury thought there was negligence in the defendants, and his Lordship asked them, first, whether there was negligence in the construction of the platform relatively to the construction of the carriage, leading to the accident; secondly, whether there was contributory negligence on the part of the plaintiff. The jury found a verdict for the plaintiff, damages £500. Execution was stayed, and a motion made for a rule to enter a verdict for the defendants, or for a new trial. On this motion the defendants, who alleged that they were misled as to their defence by a previous statement made to them by the plaintiff as to the tickets he had taken, read affidavits to show it, and to explain the position of the two railway companies *inter se*. In one affidavit the chief clerk to the superintendent of the defendant railway company deposed that the plaintiff had called at his office on the 9th of July, and complaining of the accident stated that he took a single ticket from Richmond to Hammersmith, and then a return from Hammersmith to the Temple, and then a single ticket from Hammersmith to Richmond, and that it was on his return with this ticket that he met with the accident. In another affidavit the managing clerk to the defendants' solicitors said that the defence was prepared on the faith of the aforesaid statement. In a third affidavit, Mr. Forbes, 270] the chairman of \*the defendant company, deposed that the arrangements between the Metropolitan District Railway Company and the London and South Western Railway Company with regard to the use of the line between Hammersmith and Richmond, and the stations at Hammersmith, were, on the 5th of July, 1877, and still were, *inter alia*, as follows:

Each company has a separate station at Hammersmith, some distance from the other, the South Western is called Hammersmith (Grove Road) station, and the District station is called the Hammersmith (Broadway) station.

The whole of the railway between Hammersmith and Richmond, speaking of the Grove Road station as Hammersmith, belongs to the South Western Company, but speaking of the Broadway station of the District Company as



Hammersmith, there are thirty-eight chains of District Railway intervening between the Broadway station and the South Western Railway.

The District Railway run over and use the before mentioned South Western Railway, under the authority of the Metropolitan District Railway Act, 1875, by which it is provided that the District Company may run over and use with their engines and carriages of every description, and with their officers and servants in charge of trains, but only for the purposes of passenger and coach traffic to and from their railway, the portions of the London and South Western Railway from the junction therewith of the District Railway, and the new passenger station of the London and South Western Railway at Richmond. . . . It was further provided by the act that the District Company in using or traversing the said portions of railway, and the stations and conveniences thereto, should at all times observe the regulations and by-laws in force on the South Western Railway.

After setting forth the working arrangements between the two companies, the affidavit further stated that the District Company had not, on the 5th of July, 1877, nor had they ever had, any booking clerks or servants of their own at the Richmond station, and every ticket issued at that station was and is issued by the South Western Company, who are the owners and have the entire control of that station and of their railway to Hammersmith, and that the District Company would not receive any part of the toll \*paid by [271] the plaintiff in respect of his journey from Hammersmith to Richmond.

A rule was granted on the affidavits calling on the plaintiff to show cause why the verdict found for him should not be set aside and a verdict and judgment entered for the defendants, on the ground that upon the facts proved at the trial the defendants were not liable to the plaintiff in respect of the negligence alleged.

On the argument of the rule affidavits were read, one of which stated that "The booking office at the New Richmond station has two doors facing the station yard. Opposite these two doors are two corresponding doors leading on to the platform. There is a wooden inclosure in the centre of the booking office, with two pigeon holes placed so as to be convenient for passengers passing in at either door respectively. Over one of the said doors facing the station yard are written the words 'North London booking office,' over the other facing the station are written the words, 'South Western and Metropolitan booking office, and District Rail-

1879

Foulkes v. Metropolitan District Railway Co.

way.' " Tickets issued from the office were also produced to the court. One ticket headed "L. & S. W. R.," was for journeying on the London and South Western line only, the other ticket had no heading, but bore upon its face the words "viâ District Railway."

*Parry, Serjt.*, and *A. L. Smith*, showed cause: First, it was admitted in the pleadings and proved at the trial that the contract of carriage was made with the defendants. The jury found negligence in the performance of the contract, and therefore the plaintiff was entitled to recover. Secondly, if affidavits are admissible, it appears from them that the defendants issue tickets at the Richmond station; and the affidavits made for the defendants show that the train in which he travelled belonged to the defendants, and was under the control of their servants. Whether the journey was entirely over their own line, or partly over the line of another company under an agreement or running powers, the contract was that due care should be used in carrying the passengers from one end of the journey to the other: *Thomas v. Rhymney Ry. Co.* (1); *Great Western Ry. Co. v. 272*] *\*Blake* (2). An action against the South Western Company could not have been sustained: *Wright v. Midland Ry. Co.* (3). Thirdly, independently of any contract of carriage, the defendants are liable, because the plaintiff was in the defendants' train by their invitation and consent, and being there, was hurt by their negligence, *Dalyell v. Tyrer* (4); *Marshall v. York, Newcastle and Berwick Ry. Co.* (5); and see *Austin v. Great Western Ry. Co.* (6), as in the case of property destroyed while in the custody of carriers by their negligence, although the plaintiff may not be able to sue on any contract of carriage: *Martin v. Great Indian Peninsula Ry. Co.* (7).

*Waddy, Q.C.*, and *Bray*, in support of the rule: The defendants do not issue tickets at Richmond. There is no arrangement with the South Western Railway Company that they should do so. The notice over the booking office is merely given for the convenience of the booking clerk. The defendants are not bound by it. The ticket is evidently that of the South Western Railway Company, and its description of the route, "viâ Metropolitan," shows that the defendants are not the contracting company. Nor is it likely that they should be so in respect of a journey five

(1) Law Rep., 6 Q. B., 266.

(2) 7 H. &amp; N., 987; 31 L. J. (Ex.), 346.

(3) Law Rep., 8 Ex., 137; 5 Eng. R., 332.

(4) 28 L. J. (Q.B.), 52.

(5) 11 C. B., 655; 21 L. J. (C.P.), 34.

(6) Law Rep., 2 Q. B., 442.

(7) Law Rep., 3 Ex., 9.

miles of which is over the South Western and only half a mile along the defendants' line. The contract is with the South Western Railway Company. They were the principals, and the defendants were agents. The South Western Company take the fares. They may be said also to hire the carriages. It was their platform which, by not fitting the carriages, caused the accident. The duty for breach of which this action is brought arises out of contract. That contract being express, none other can be implied: see Addison on Torts, 3d ed., p. 466. In *Austin v. Great Western Ry. Co.* (1), where a young child for whom no fare had been paid by its mother was hurt in a train, and recovered damages from the railway company, the right to recover was based on contract. No case can be cited in which a railway company having made the contract of carriage, an accident has happened on their line, and yet another company has been held \*responsible. If a traveller becomes a [273 passenger on a railway, intending to be a passenger, even although he may not have taken a ticket, a contract may be implied. But here the passenger was travelling under an express contract with another company. And even although the action be framed in tort, it is regarded as arising out of contract: *Powell v. Layton* (2).

[GROVE, J.: Suppose the defendants had stopped their train alongside the parapet of a bridge, and invited the passenger to get out there, and he, getting out, fell over the bridge into a river below, would not that be negligence in them?]

Not unless it was wilful wrongdoing. The duty to take care of him arises out of the contract to carry. If the defendants contracted at all, their contract was only to carry the plaintiff from the Temple to Hammersmith. His journey thence to Richmond was under his contract with the South Western.

[LOPES, J.: Might there not be two contracts, one with each company?]

It would be strange to have two contracts for the same purpose. In *Thomas v. Rhymney Ry. Co.* (3) the company issuing the ticket were sued, although the negligence was that of another. So in *Blake v. Great Western Ry. Co.* (4). If the contract was with the two companies, both should have been made defendants.

The invitation to become a passenger was given by the South Western Railway Company, and not by the defend-

(1) Law Rep., 2 Q. B., 442.

(2) 2 B. & F. (N.R.), 365.

(3) Law Rep., 6 Q. B., 266.

(4) 7 H. & N., 987; 31 L. J. (Ex.), 346.

1879

Foulkes v. Metropolitan District Railway Co.

ants, who are merely their agents: see *Scothorn v. South Staffordshire Ry. Co.* <sup>(1)</sup>.

[LOPES, J.: Might not agents be liable for negligence?]

They are liable for misfeasance, but not for nonfeasance: Dicey on Parties, p. 143, and the injury to the plaintiff was from nonfeasance only. In *Winterbottom v. Wright* <sup>(2)</sup> it was held that the plaintiff, employed by contractors to drive a coach provided by the defendants for the Postmaster-General, could not recover for injuries through the breaking down of the coach, because there was no privity of contract between him and the defendants. So here there was none between the parties to this action.

274] \*GROVE, J.: The meaning of the rule is doubtful, but I will read it most favorably to the defendants by assuming it to be a rule, first to enter the verdict for the defendants on the ground that there were no facts at the trial to go to a jury as evidence of the defendants' liability, and, secondly, for a new trial upon affidavits. I am of opinion that upon both those grounds the rule should be discharged. From the learned judge's notes themselves it seems to me that there is ample evidence for the plaintiff, and none to meet it on the part of the defendants, and that if we were to confine our attention to those notes the case would not have been arguable. But, to make it so, the counsel for the defendants have shown from the shorthand writer's notes of the trial that, during a discussion there, some interrogatories answered by the defendants were handed in by the counsel for the plaintiff. Whether they were formally put in evidence is uncertain, but it will be safer to assume that they were in evidence. Mr. Waddy then says, that it was proved by those interrogatories that the tickets of the defendants' railway were issued by the London and South Western Railway Company, and, assuming as I do for the purpose of my judgment, that the interrogatories and answers formed part of the case, and were intended to be produced before this court, I certainly shall assume that in one sense of the word "issued," the tickets were issued by a person who attends at the station for the purpose of issuing tickets, and was in the service of the London and South Western Company, and not in the service directly, at all events, of the Metropolitan District Railway Company. The affidavit of Mr. Forbes says so and is not contradicted, therefore that fact must be taken as the datum in the case. The ticket was actually issued by the bookkeeper at a station which in one sense belongs to the South Western Company,

<sup>(1)</sup> 8 Ex., 341.

<sup>(2)</sup> 10 M. & W., 109.

but on the outer part of the station the words "South Western and Metropolitan Booking Office and District Railway" are written.

The question is, were the Metropolitan District Railway Company, the defendants, liable for that which the jury have found to be an act of negligence? [The learned judge stated the evidence of negligence.] I need not say whether if this action had been brought against the South Western Company they might not have \*been held liable, because it does not seem to follow by any means as a necessary consequence that two parties may not be liable respectively for the same accident. Take the ordinary case of an accident caused by the negligence of a wrongdoer whose master is responsible for it. I do not think it could be said, and indeed it has not been contended, that the person injured might not if he chose bring his action against either the master or the servant. The servant who has caused the accident is not exempt from liability for his negligence because his master will be liable for it. It is however unnecessary to decide the question as to the liability of the South Western Company. Therefore I do not base my judgment upon it. But I base my judgment upon this, viz., that there was reasonable evidence to go to the jury of liability on the part of the defendant company, and I say so, assuming the strongest point which I am asked to assume in their favor, viz., that the persons employed by the South Western Company at the booking office were the persons who issued the tickets. [The learned judge reviewed the facts.]

It is admitted that, if the plaintiff had taken his ticket at Hammersmith station direct, the District Railway Company might have been liable because there would have been a contract with the company, but the defendants say that he, having used the return part of his ticket from Hammersmith to Richmond which is exactly the same, in its effect, as if he had taken a direct ticket (with the difference simply of a small reduction in price in consequence of its being a return ticket), they are not liable because the original contract being with the South Western Railway Company that contract remains to fix the South Western Railway Company with the liability and exempts the District Railway. But I am of opinion that, whatever may be the liability of the South Western Company, on which I pronounce no judgment, here the Metropolitan District Company are not exempted. First, because they have invited or knowingly permitted the plaintiff to enter their carriage, and by that alone they, as I think, undertook to carry him safely and

plicable to succeeding similar, though not identical, cases. It seems to me that the general principle to be deduced from these cases is, that where in a mercantile contract of purchase and sale of goods to be delivered and accepted the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he never could fulfil his undertaking to accept or deliver the whole [257] of the specified quantity. The reasons \*given are that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part; that the other party should have been or should be always ready, and willing, and able to accept or tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts seems to me to fortify the one construction and condemn the other. Suppose, in the case of shipments, the seller has by contracts made abroad provided for all the successive shipments, and has taken up ships to proceed and call for the successive cargoes, and the first seller to him fails to fulfil his contract, so that the first shipment fails, the purchaser under the main contract we are discussing may, upon one construction suggested, throw up the whole contract, although he could be amply recompensed for the partial failure, and throw the loss of all the other purchases and charters upon the seller without any compensation. So if the purchaser has made contracts, and fails to take delivery of one parcel, the seller, although he might be amply compensated for the partial failure, would be entitled to ruin the buyer with regard to his forward contracts without any compensations. Again, suppose any one of the ships lost after a perfectly good shipment by several ships, either buyer or seller might at once cancel the whole contract, to the irreparable loss of the other party, although he himself might be amply compensated by a payment in damages; or suppose a seller to send all the stipulated quantity in one ship, and a jettison to have become inevitable on the voyage, he is to have the

whole of the remainder of the cargo left on his hands without compensation, although the buyer might easily be compensated for the short delivery. These considerations show that the rule of construction adopted by the courts is as sound on mercantile as it is on legal considerations, and all the considerations, both mercantile and legal, apply as much and as fully to the present contract as to those cited. The question of the time or mode of payment has nothing to do with the reasoning for or against either view; moreover, it is most important, in my opinion, that the \*construc- [258  
tion of mercantile contracts should be broad and large, and should not depend on refined logical deductions, or on slight variations either in the terms or the conditions of each particular contract. The contract, for instance, now before us differs as to the period and conditions of payment from that in *Brandt v. Lawrence* (<sup>1</sup>), but it differs very little as to the terms of payment from the other cited cases. That difference as to the periods of payment makes no difference in the reasons given for the decisions in those cases, in which the stipulation as to the payment was not noticed, and in *Brandt v. Lawrence* (<sup>1</sup>) it is not even reported.

I am of opinion that the plaintiffs are entitled to recover in respect of twenty tons, leaving the defendants to a cross action in respect of five tons.

*Judgment affirmed.*

Solicitor for plaintiffs: *John Rae.*

Solicitors for defendants: *Hollams, Son & Coward.*

(<sup>1</sup>) 1 Q. B. D., 344.

As to the meaning of the word "about," see 2 Chitty on Cont. (11th Am. ed.), 1060 note h.; *Morris v. Levi-son*, 16 Eng. R., 496; *Clapp v. Thayer*, 112 Mass., 296; *Hawes v. Lawrence*, 4 N. Y., 345; *Callmeyer v. Mayor*, 83 id., 116; *Harrington v. Mayor*, 70 id., 604, 10 Hun, 248, 251-2; *Turner v. Whedden*, 22 Maine, 121; *Woodruff v. Cook*, 25 Barb., 505; *Peck v. Mallams*, 10 N. Y., 509; *Creighton v. Comstock*, 27 Ohio St. R., 548; *Brawley v. United States*, 11 Court Claims R., 522, 532-3, 96 U. S. Rep., 163; *Hardy v. United States*, 9 Court Claims R., 244; *Bel-*

*knap v. Sealey*, 14 N. Y., 144; *Cabot v. Winsor*, 1 Allen, 546; *Pingree v. County Comm'rs*, 102 Mass., 76, 78; *Tarbell v. Bowman*, 103 id., 344; *Chapin v. Clarke*, 7 Grant's (U.C.) Chy., 75; *Wood v. Orser*, 25 N. Y., 348; *Moffet v. Sackett*, 18 id., 522; *Rea v. Holland*, 12 North Western Reporter, 167, Supreme Court, Michigan; *Lawson on Customs and Usage*, 377, 451; *Dos Passos on Stock Brokers and Stock Exchange*, 830; *Biddle's Law of Stock Brokers*, 87-9; *Benjamin on Sales* (2d Am. ed.), §§ 591, 691-2.

1879

Foulkes v. Metropolitan District Railway Co.

that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff, and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge* <sup>(1)</sup>, and ending with *Pozzi v. Shipton* <sup>(2)</sup>, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carriers." That decision given in the year 1851, was in the year 1867 thus referred to by Blackburn, J., delivering judgment on the case of *Austin v. Great Western Ry. Co.* <sup>(3)</sup>: "I think that what was said in the case of *Marshall v. York, Newcastle and Berwick Ry. Co.* <sup>(4)</sup> was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." Lush, J., and Shee, J., put it upon contract. Lush, J., saying, "I prefer to rest my judgment on the ground of contract. I think there was a contract to carry the mother and child, and that contract operated in favor of each party. The only question is, whether the facts averred in the plea and found by the jury, negative the existence of any such contract as I have mentioned. I think they show that there was an undertaking to carry the plaintiff." Although so far basing his decision upon a different ground, the learned judge assumes that the undertaking to carry the passenger does in fact amount to a contract. Therefore I venture to say that, *quacunqve via*, either the action will lie without a contract for which *Marshall's Case* and *Austin's Case* are authorities, or, if a contract be necessary, I think there was 279] here \*evidence, and sufficient evidence to go to a jury, of an undertaking or contract by the defendants to carry for reward and for their own interest, and of permitting the plaintiff to go into their railway carriage for their own purpose, which would be evidence of a contract. A ticket, although that may be evidence, it is not the sole and only evidence of a contract. When carriers take the passenger into their carriage, treat him as a passenger, and probably examine his ticket, these and other circumstances in this case which I need not recapitulate, seem to be ample evidence of a contract to carry safely. *Austin v. Great West-*

<sup>(1)</sup> 3 East, 62.<sup>(2)</sup> 8 Ad. & E., 963.<sup>(3)</sup> Law Rep., 2 Q. B., 442, at p. 445.<sup>(4)</sup> 11 C. B., 655; 21 L. J. (C.P.), 34.



*ern R. Co.* (') goes, in some particulars, beyond this case. There the company were bound by their statute to carry children under three years of age, when they were accompanied by their friends, free of charge, and for children above three years of age they were entitled to charge half fare. The woman took a child some two months over three years of age with her into the carriage. She was not guilty of any fraud, but ought to have paid half fare for the child. The railway company were not aware of the child's age and made no inquiry, the child was hurt by an accident and an action brought in which the company were held liable, Blackburn, J., giving the judgment already mentioned, Lush and Shee, JJ., basing their judgments on the contract, but being also of opinion that the company were liable because of their reception of the child and mother into the carriage. That fact seems to have been deemed by Shee, J., enough to constitute a contract, and in the view of Blackburn, J., to make the defendants liable. The peculiarity of the case is that, the terms upon which the railway company undertake the contract were not complied with. The company's contract might have been said to be this: "If you bring a child under three years of age and pay your own fare, we will carry your child for nothing as the statute obliges us to do." But there is no such undertaking to carry a child above three years of age, and therefore, as far as contract goes, if an agreement between the parties is to be assumed, there was no agreement, because the railway company not only did not agree to carry gratis a child above three years old, but, if they had known the child was above three years of age, they would not have carried it without payment. \*Therefore there was no contract in which [280 both parties were *ad idem* and both agreed, and yet the court held that taking the child into the carriage and permitting him to be there a passenger on the railway, although they had made no express contract and would not have done so had they known the circumstances, rendered them as liable as if there had been a contract. I think that is an *a fortiori* case. In the present case the defendants received the plaintiff knowingly, and the jury have found that they were negligent. I fail to see how they could have come to another conclusion. It is argued that the negligence was in the South Western Railway Company having the platform too low. If that be so, still I do not think that the defendants who, having undertaken to safely carry the plaintiff, brought him to the platform which, as is admitted, they

(') Law Rep., 2 Q. B., 442.

knew was too low, and let him get out there without warning, and be hurt, can be allowed to say that some other person was in fault for not making the platform higher. It seems to me that it was the defendants' duty either to arrange with the South Western Company so as to have a proper platform, or to warn their passengers when they knew, as the defendants did, that there was danger.

Were it necessary to decide this case upon the question of agency, the inclination of my opinion is that the South Western Company were, as regards the plaintiff, the agents of the Metropolitan District Company, and that there was a kind of mutual agency for their mutual convenience, each company undertaking to act when it was most convenient for them to issue tickets for their own benefit and the benefit of the South Western Company. I do not, however, rest my judgment upon that, because I think the affidavits do not show it, and there was no evidence of it at the trial. In my opinion, there being no reason why the verdict should be disturbed, this rule should be discharged.

LOPES, J.: I also think that this rule should be discharged. It was difficult for me at first to understand precisely the meaning of the rule, but it now seems that the question raised is, whether assuming the defendants to have been negligent, there was sufficient evidence of the defendants' liability to the plaintiff, upon which the jury could 281] reasonably act. The counsel for the \*defendants argued that there was no such evidence and no contract with them. They said that the ticket was not taken from the defendant company, but was issued by the South Western Company. This may be so. It may be that the South Western Company issued the ticket and that they did not issue the ticket as the agent of the defendant company; but in my view it seems unnecessary for the purposes of this case to decide that point. I will assume in the defendants' favor that no ticket was granted by them, and that the ticket issued was granted by the South Western Company. Was there not evidence before the jury from which they might reasonably infer an undertaking by the defendants to carry the plaintiff with reasonable care and to deliver him at his journey's end, and provide for him reasonable facilities for getting out of that carriage? What is the evidence? The defendants received the plaintiff into their carriage at Hammersmith, in point of fact they invited him to get into it. The carriage in which he travelled was under the control of the defendants' servants. The engine drawing the train to which the carriage was attached belonged to the

.

defendants and passed over at least a portion of the defendants' line. The defendants at Hammersmith might and, in fact, ought to have examined his ticket; and if they thought fit might have prevented him going into the carriage at all. He proceeded in that train of the defendants to Richmond, and there the accident happened. The jury have found that the accident was caused by the defendants' negligence.

It seems to me that there was evidence, and I may say abundant evidence, on which the jury were justified in finding a contract by the defendants to carry the plaintiff with reasonable care and to provide reasonable, fair, and proper facilities for his alighting from the defendants' carriage when he arrived at Richmond. But it is said, if that be so, then the plaintiff might have two remedies, one against the defendant company on their implied contract or undertaking (I do not think it much matters whether we call it a contract or an undertaking, especially after the cases of *Marshall v. York, Newcastle and Berwick Ry. Co.* (\*), and *Austin v. Great Western Ry. Co.* (\*)), the other \*remedy against [282 the South Western Company who issued the ticket. I cannot see any difficulty in that. Take this illustration: railway A. issues tickets for railway A. and railway B. The traffic is sometimes worked by carriages and servants belonging to railway A., and sometimes by carriages and servants belonging to railway B. A passenger takes a ticket from railway A. and gets into a carriage belonging to railway B., drawn by railway B.'s engines, and manned by railway B.'s servants. The passenger traverses some portion of railway B.'s line, an accident is caused by the negligence of railway B.'s servants, and through some defect in railway B.'s carriages not being properly adapted to the exigencies of the traffic. Now, although not necessary perhaps, to go that length for the decision of this case, I think that, according to the authorities, the passenger could sue either railway A. or railway B. He could sue railway A. on the contract arising from the ticket issued by the company to carry him the whole distance with reasonable care or caution, or he could sue railway B. as the immediate authors of the negligence, on the implied contract or undertaking which would arise from his having been received into the carriage, or from his having been invited to go into the carriage of railway B. and become a passenger on the railway.

*Rule discharged.*

Solicitors for plaintiff: *Faithful & Owen.*

Solicitors for defendants: *Baxter & Co.*

(\*) 11 C. B., 655; 21 L. J. (C.P.), 34.

(\*) Law Rep., 2 Q. B., 442.

1879

Wagstaff v. Anderson.

As to liability of carriers for injuries to goods by connecting carriers, see 28 Eng. R., 193 note; 14 id., 275-6 note; 21 id., 68 note.

Where it is necessary for a traveller, in going from one place to another, to pass over the connecting lines of several railroad companies, it is competent for either company to contract with him for the transportation of himself and baggage the whole distance, or

that its liability shall be confined to loss or damage occurring on its own road; but the collection by such contracting carrier, of fare in advance for the entire journey, without agreement as to risks, renders it liable, on receipt of such traveller's baggage, to transport it safely to the end of the route and there deliver it on demand to such owner: Railroad Co. v. Campbell, 36 Ohio St. R., 647.

---

[4 Common Pleas Division, 283.]

May 23, 1879.

## 283] WAGSTAFF and Others v. ANDERSON and Others.

*Shipping—Charterparty—Unjustifiable sale of Goods by Captain at intermediate Port—Liability of Shipowner.*

The plaintiffs wishing to send cement and stone from London to Callao, the defendants, on the 24th of June, wrote offering them "room" for it in the ship F. K. Dumas, and on the 25th of June the defendants chartered the ship of the owners for a voyage from London to Callao by a charterparty providing, *inter alia*, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; that the ship should be addressed to the charterers' nominees at the port of discharge; and the charterers' responsibility, except for freight, was to cease on the vessel being loaded.

On the 26th of June an agreement was made between the defendants, "acting for the owners" of the ship, and the plaintiffs that the former should receive on board cement and stone at a certain freight from London to Callao and sail on a certain date. Freight to be paid, one half on signing bills of lading, and the remainder on final discharge at Callao.

The cement and stone were shipped, half freight was paid, and the master signed bills of lading making the other half payable at Callao; and the ship sailed, but being damaged by bad weather put into an intermediate port where she was condemned, and the captain sold the plaintiffs' goods, believing that he was unable to forward them.

The plaintiffs having sued the defendants for the value, the jury found that the sale was not justified:

*Held*, that the captain, in selling the goods, was not acting as the servant or agent of the defendants, and they were therefore not liable for the conversion.

**FURTHER CONSIDERATION.** Action to recover damages for the non-delivery and wrongful sale and conversion of goods shipped by the plaintiffs on board a vessel which the defendants had chartered.

The proceedings, facts, and arguments are sufficiently stated in the judgment.

*Watkin Williams*, Q.C. (*Hannen*, with him), for the plaintiffs, cited in addition to the cases mentioned in the

judgment, *Mitcheson v. Oliver* ('); *Shipton v. Thornton* ('); *Acatos v. Burns* (').

\**Cohen, Q.C. (Butt, Q.C., and J.C. Mathew with him)*, [284 for the defendants, cited the following additional authorities: *Sandeman v. Scurr* ('); *Gilkison v. Middleton* ('); *Machlachlan on Shipping*, 2d ed., p. 387; *Lloyd v. Guibert* ('); *Hunter v. Prinsep* ('); *Wilson v. Dickson* ('); *The Gratitude* ('); *Notara v. Henderson* ("); *Quarman v. Burnett* ("); *Tobin v. The Queen* ("); *Hingston v. Wendt* ("); *Trorson v. Dent* (").

In reply, *Doolan v. Midland Ry. Co.* ("); *Hayn v. Culliford* (") were referred to.

*Cur. adv. vult.*

May 23. DENMAN, J.: The plaintiffs in this case were the well known contractors Messrs. Brassey & Co., and they sued for the value of a cargo of stone and cement which had been shipped on board the ship *F. K. Dumas*, in London, for Callao, and sold in Monte Video under the circumstances afterwards mentioned. The defendants were charterers of the ship under a charterparty of the 25th of June, 1872, which, amongst other things, provided as follows: It was agreed between the master on the part of owners of the good ship *F. K. Dumas* and the defendants that the ship should perform a voyage from London to Callao; that she should be maintained in her class by the owners while under the charter; that she should receive on board at such loading berth as the charterers might appoint, all such lawful goods as might be required; that the whole ship should be at the disposal of the charterers for the conveyance of goods, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be and remain responsible to all whom it might concern as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require, without prejudice to \*the charterparty; that the ship [285 should be addressed to the charterers' nominees at the port

(1) 5 E. & B., 419.

(2) 9 Ad. & E., 314.

(3) 3 Ex. D., 282.

(4) Law Rep., 2 Q. B., 86.

(5) 2 C. B. (N.S.), 134; 26 L. J. (C.P.), 209.

(6) Law Rep., 1 Q. B., 115.

(7) 10 East, 378.

(8) 2 Stark., 1; 2 B. & Ald., 2.

(9) 3 Chr. Rob., 240.

(10) Law Rep., 7 Q. B., 225; 1 Eng. R., 269.

(11) 6 M. & W., 499.

(12) 33 L. J. (C.P.), 199, at p. 204.

(13) 1 Q. B. D., 367; 16 Eng. R., 405.

(14) 8 Moo. P. C., 419.

(15) 2 App. Cas., 792; 21 Eng. R., 48.

(16) 3 C. P. D., 410; ante, p. 259.

1879

Wagstaff v. Anderson.

of discharge; that the ship, being loaded, should proceed to Callao and deliver the cargo agreeably to bills of lading in the usual and customary manner, the act of God, &c., excepted; the total freight to be paid for the use and hire of the ship was agreed at the sum of £2,500, to be paid as follows, against captain's order, viz., by charterers' acceptance payable at ninety days from the ship's final sailing from Gravesend, or in cash at 5 per cent. discount at captain's option; but the owners were to accept in satisfaction of freight all bills of lading bearing freight payable abroad, not exceeding one-third of the amount of charter; and the charterers' responsibility, except for freight, was to cease on the vessel being loaded.

On the 26th of June, the defendants Moss & Mitchell (whose acts it was admitted were binding upon the other defendants as well as themselves) entered into the agreement with the plaintiffs set out in the statement of claim, as follows: "It is this day mutually agreed between Messrs. Moss & Mitchell, *acting for the owners of the F. K. Dumas*, and [the plaintiffs], that *the former* shall receive on board in the London Docks 1,000 tons of cement in casks and stone in blocks, at the rate of 30s. per ton freight from London to Callao; the ship to receive the cement, &c., about 25th July and to sail about 25th August. The barges as they come alongside shall be immediately discharged, or Moss & Mitchell undertake to pay demurrage on barges. The cargo to be received at Callao as customary. Freight to be paid, one half on signing bills of lading, less two months' discount at 5 per cent. per annum, and the remainder on final discharge at Callao. Penalty for non-performance of this agreement, £1,500."

Before entering into the charterparty of the 25th of June, the defendants had written to Messrs. Smith, Sundries & Co., the plaintiffs' brokers, on the 24th of June, offering "room" in the ship F. K. Dumas to Callao for 750 tons of cement and 250 tons of stone at the same rate as that mentioned in the agreement of the 26th.

About 1,000 tons of stone and cement were shipped, and the vessel sailed in due course. Before sailing, viz., on the 29th of August, 1872, the master signed bills of lading for 286] the cement \*and stone, "to be delivered at Callao, the act of God excepted, unto order or to plaintiffs' assigns, on paying freight for the goods £786 17s. 4d."

£780 6s. 1d. (the half freight, minus the discount of 5 per cent. for two months) was paid by the plaintiffs to the defendants before the ship sailed, leaving the residue, which

was the sum mentioned in the bill of lading, to be paid at Callao.

The vessel, having sailed, met with bad weather about the 30th of October, and was obliged to put into Monte Video. A survey took place, and on the 4th of December the cargo was discharged by order of the surveyors, and the stone and cement were landed and warehoused. The ship was condemned on the 17th of January, 1873; and it was admitted that she was properly condemned. A portion of the cargo was sent on to Callao in other vessels; but the master, having made inquiry as to the possibility of obtaining vessels to carry on the stone and cement, without communicating with the plaintiffs, sold the cement on the 7th of February, and the stone on the 28th.

It was agreed at the trial that the only questions for the jury were,—first, whether the sale was justified,—and secondly, the amount of damages; and that, if any other question of fact remained, it should be disposed of by me after argument on further consideration. The jury found that the master was not justified in selling, and assessed the damages at £1,445, and said that if they were entitled to give interest from the date of the sale until the time of the verdict, they should do so. The £1,445 was the value of the goods at the time of sale; and I think that, if the plaintiffs were entitled to recover, they were entitled also to the 5 per cent. (that is, to £450) as fair damages for the conversion, according to the principle explained in *British Columbia Sawmill Co. v. Nettleship* (1).

The defendants proposed at the trial to give evidence of a custom that loading brokers are not liable after the goods are received on board; and it was agreed that, if I should be of opinion that evidence of such a custom would be admissible, I should before giving judgment, either take further evidence as to the existence of such a custom myself, or appoint some one to \*report to me after taking [287] evidence thereon. This contention was not seriously pressed in the argument on further consideration; and I remain of the opinion I expressed at the trial, that such evidence was not admissible, and that the case must be decided according to the view to be taken of the relation between the parties, to be gathered from the documents in the case, and of the proper inferences to be drawn from the facts proved at the trial.

The defendants' counsel at the trial put in a great many documents to show that the plaintiffs were for many weeks

(1) Law Rep., 3 C. P., 507, 510.

in correspondence with Smith, Sundries & Co. about their claim upon the underwriters in respect of the stone and cement in question: but I lay no stress upon this evidence, as it might well be that the plaintiffs, or Smith, Sundries & Co., might be doubtful as to their rights in a case of this description; and the only real question in the case is, whether, under the circumstances which have occurred, they were entitled to sue the defendants for the unjustifiable sale of their goods by the master, or whether the master alone or the shipowner was the proper person to sue, which depends, not upon what the plaintiffs or Smith, Sundries & Co. afterwards thought, but upon what was the relation of the master to the defendants at the time of the sale.

The case was argued very fully and very powerfully before me, and a great number of authorities were cited, many of which, however, it is unnecessary to consider, upon the view I take of the relation between the parties in this case. On the part of the plaintiffs it was contended that, though the charterparty of the 25th of June did not amount to an actual demise of the ship, yet, inasmuch as the defendants had hired the exclusive use of the ship, they were practically the owners of the ship for the voyage, and that the words in the contract of the 26th of June, "acting for the owners of" the ship, meant "acting for the defendants," and that the contract of the 26th therefore, coupled with the bill of lading, amounted to a contract between the plaintiffs as shippers of the goods and the defendants as carriers from London to Callao; and that the master in selling the goods acted as the servant or agent of the defendants, and they were therefore responsible for his acts. It was contended that, inasmuch as the master, though the sale itself was unjustifiable, was acting within the general \*scope of his authority as agent for the defendants, and inasmuch as there are certain cases in which a sale of the cargo is justifiable, therefore the sale, though unjustifiable in the particular case, was one for which the defendants were liable upon the principle acted upon in *Ehobank v. Nutting* <sup>(1)</sup> and other cases.

For the defendants it was contended that the contract between the parties was not a contract for carriage, but only an agreement on the part of the defendants that the goods should be received on board the ship, and that room for them should there be found, so that they might be the subject of a bill of lading to be signed by the captain on behalf of the owners of the ship, without any undertaking on the part of

(1) 7 C. B., 797.



defendants in relation to the actual conveyance of the goods or the dealing with them on the voyage between London and Callao. It was also contended that even the shipowner would not be liable for the unjustifiable sale of the goods by the master, and that, even if the master was the agent of the defendants for some purposes in dealing with the goods at Monte Video, he was not acting as their agent in *selling* them so as to make them liable for his act.

To this it was answered that, looking at the conduct of all parties, it ought to be held as a fact, or concluded from the facts, that the master was throughout acting for the defendants, both in carrying and in dealing with the goods at Monte Video; and stress was laid upon the fact that what he had done was done in the interests of the defendants, and had to some extent been recognized by them as an act done for their benefit. It was agreed that I should draw any inferences of fact or find any question of fact not found by the jury; and it was suggested that it might be a question of fact whether the master signed the bills of lading as agent for the defendants or the shipowners. If this be a question of fact for me, I find it for the defendants; and I am of opinion that, notwithstanding the interest the defendants had in the due prosecution of the voyage and conveyance of the goods to their destination, the master in selling the goods was not acting as the servant or agent of the defendants either in law or in fact. Looking at the letter of the 24th of June, 1872, which is headed in print, "Messrs. Moss, Mitchell & Co., Ship and Insurance Brokers," and sent to Smith, \*Sundries & [289 Co., the plaintiffs' brokers (in which they merely offer "room" in the ship *F. K. Dumas* at certain rates of freight), and at the terms of the letter of the 26th of June constituting the contract between the plaintiffs and the defendants, I do not think that the latter document binds the defendants to any of the terms of the bill of lading so far as relates to the carriage of the goods or the duty of the master after the goods are once received on board. It appears to me that it merely amounts to a contract that the owners of the ship shall receive the goods on board and enter into contracts by bills of lading to carry them at certain rates of freight, and that the ship shall sail on or about a certain day named, and that the defendants will pay certain demurrage if the barges are delayed. All the other stipulations are on the part of the plaintiffs, who are left to make their own contract with the shipowners through the master for the carriage of the goods, and who in fact did take bills of lading

in the ordinary form from the master, not purporting to act in any other capacity than as master of the ship.

If I am right in the above view of the case, it follows that, inasmuch as the master was not the agent or servant of the defendants at all, except to receive the goods on board and to sign bills of lading which should be binding on his owners as to the carriage of the goods, the defendants cannot be held liable for the conversion of the goods at Monte Video.

It was argued for the plaintiffs, that, by the very fact of having entered into a charter such as that of the 25th of June, the defendants became the virtual owners of the ship for the voyage; and the cases of *Newbery v. Colvin* (<sup>1</sup>), *Major v. White* (<sup>2</sup>), *Marquand v. Banner* (<sup>3</sup>), and *Schuster v. McKellar* (<sup>4</sup>), were relied upon; and it was argued from thence that the master became the agent of the charterers for arranging all matters relating to the carrying on or not carrying on the goods, even to the extent of selling them, if necessary. But it appears to me that the very terms of the charterparty in this case are against any such liability on the part of the charterers; for the responsibility of the master and owners "to all whom it may concern" for proper 290] attention to the cargo is \*expressly reserved by the charterparty; and it is provided that the charterers' responsibility under it, except for freight, shall cease on the vessel being loaded.

Such being my opinion as to the relation created between the plaintiffs and defendants in this case, it becomes unnecessary to consider the question whether the defendants would be liable on the ground that the sale, being within the general scope of the master's authority, was binding on the shipowners. The defendants in my opinion never agreed to occupy the position of shipowners so as to be responsible for the master's acts after the ship had sailed and before the completion of the voyage, but left the plaintiffs' rights to be wholly regulated by the bills of lading, except in the particulars above explained.

I therefore give judgment for the defendants.

*Judgment for the defendants.*

Solicitors for plaintiffs: *Parker & Co.*

Solicitors for defendants: *Hollams, Son & Coward.*

(<sup>1</sup>) 1 Cl. & F., 283, per Lord Tenterden.

(<sup>2</sup>) 6 E. & B., 238.

(<sup>3</sup>) 7 C. & P., 41.

(<sup>4</sup>) 7 E. & B., 704, 724.

[4 Common Pleas Division, 316.]

May 8, 1879.

**\*SCARAMANGA V. STAMP and Another. [316***Shipping—Deviation—Charterparty.*

A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.

The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the Arion, and the master in consideration of £1,000 agreed to tow her into the Texel, which was out of his direct course. Whilst so doing, the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost.

In answer to questions put to them by the learned judge, the jury found that it was not reasonably necessary to take the Arion to the Texel in order to save the lives of those on board her; but that it was reasonably necessary to do so in order to save her and her cargo:

*Held*, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover against the owners the value of the cargo.

**ACTION** on a charterparty, by the freighters of cargo against the owners of the vessel for the loss of the cargo under the circumstances set out in the judgment.

The cause was tried before Lindley, J., at the last Easter Sittings, and was argued upon motion for judgment in the same sitting by

*Butt*, Q.C., *J. C. Mathew*, and *Lodge*, for the plaintiff, and by *Cohen*, Q.C., *Herschell*, Q.C., and *F. O. Crump*, for the defendants. The authorities cited are all commented upon in the judgment.

*Cur. adv. vult.*

**LINDLEY, J.**, delivered judgment, as follows:

This was an action brought on a charterparty, by the freighters of a cargo of wheat against the owners of the steamship *Olympias*, for the loss of the cargo. By the terms of the charterparty the *Olympias* was to proceed with the wheat on board from Cronstadt to the Mediterranean. The excepted perils were the usual perils of the sea. The *Olympias* left Cronstadt on the 21st of November, 1877; she passed the Skager Rak on the 28th; on the 30th, whilst in her proper course, she sighted and went to the assistance of another ship in distress, called the Arion; and on the same day the master of the *Olympias* entered into an [317 agreement to tow the Arion to the Texel for a sum of £1,000. In pursuance of this agreement, the *Olympias* took the Arion in tow, and proceeded with her towards the Dutch coast. On the night of the 2d of December, 1877, the *Olympias* got

ashore near the Terschelling Light, and she and her cargo were ultimately lost ; and it is for this loss of cargo that the plaintiffs sue the defendants.

Inasmuch as the loss was caused proximately by perils of the sea, and by the terms of the charterparty the defendants are exempted from liability for loss occasioned by such perils, it was incumbent on the plaintiffs to prove the existence of circumstances which deprive the defendants of the benefit of this exemption. The plaintiffs accordingly relied on two grounds as sufficient for this purpose.

First, they contended that the loss of the ship and cargo was really attributable to the negligence of the master of the *Olympias*. If this proposition had been established, the plaintiffs would have been entitled to succeed ; for, it is settled that, as between a freighter of cargo and the owner of the ship, the latter is liable for losses really attributable to the negligence of the master, although immediately caused by perils of the sea : *Grill v. General Iron Screw Collier Co.* (1), and *The Chasca* (2). The jury, however, have decided this point in favor of the defendants ; and, for the present at all events, the verdict must be treated as conclusive.

Secondly, the plaintiffs contended that the *Olympias* deviated from her course, and that, as the loss occurred after such deviation, the plaintiffs were entitled to recover, whether there was negligence on the part of the master or not, and whether the deviation was or was not the cause of the loss of the cargo.

The fact of deviation was hardly open to serious controversy, in the face of the evidence adduced at the trial, and especially of the captain's agreement of the 30th of November, and his own letter of the 4th of December, 1877, in which he said, in effect, that he should not have been where he was had it not been for the agreement. It is true that there was great conflict of testimony as to the proper course of the *Olympias* from the Hohlmen Light, on the Danish 318] \*coast, to the English Channel,—one set of witnesses saying that she ought not to have gone near the Texel, but should have made for Orfordness Light ; and the other set saying that she should have sighted the Texel Light, and then made for the channel between the Hinder and Galloper Light-ships. But, notwithstanding this difference of opinion, none of the defendants' witnesses went the length of saying that there was no deviation on the part of the *Olym-*

(1) Law Rep., 1 C. P., 600 ; Law Rep., 3 C. P., 476.

(2) Law Rep., 4 Ad. & E., 446.

pias ; and it appeared to me that there was so little real controversy on this point that I did not think it necessary to frame a distinct question as to the fact of deviation, to be answered by the jury.

The fact of deviation therefore being established, it follows that the plaintiffs are entitled to succeed, unless the deviation took place under such circumstances as rendered it justifiable, see *Davis v. Garrett* (<sup>1</sup>), which shows that the plaintiffs need not prove that the deviation caused the loss.

The defendants, however, contended that the *Olympias* was justified in deviating, inasmuch as she deviated solely in order to assist a ship in distress, and what she did was reasonable to save life. That the *Arion* was in distress, and in fact in imminent danger, was hardly, if at all, disputed : but, in answer to questions put to the jury, they found,—first, that it was not reasonably necessary to take the *Arion* to the *Texel*, in order to save the lives of those on board her ; but,—secondly, that it was reasonably necessary so to do in order to save her and her cargo. Upon these findings the plaintiffs claim to be entitled to the judgment of the court ; and I am of opinion that they are so entitled.

On grounds of humanity, it may be taken as established that a master of a ship is at liberty to deviate from his course in order to save, and so far as may be necessary to save, persons found by him, when prosecuting his voyage, to be in danger of their lives. There is no temptation to abuse this liberty ; for, salvage is not payable for the mere preservation of life ; and owners of ships, owners of cargo, and insurers may well be treated as impliedly assenting to a departure for such a purpose from the contract not to deviate, which although not expressed is always implied in contracts of affreightment and insurance. The reasons for holding the \*master justified in deviating to save life are over- [319]whelming. To deny him this liberty would be to shock the moral sense of every right minded person, and to ignore the clear moral duty of assisting fellow creatures in distress.

But, the jury having negatived the necessity for deviating in order to save life, the defendants are driven to contend that the deviation of the *Olympias* was justifiable inasmuch as it was necessary to save the *Arion* and her cargo. No authority was cited, nor indeed is any to be found, in support of this contention ; but general principles of expediency were appealed to, and I therefore will shortly state why in my opinion the liberty to deviate ought not to be extended to cases such as I am now considering.

(<sup>1</sup>) 6 Bing., 716.

1879

Scaramanga v. Stamp.

The reasons in favor of an extension of the liberty are as follows: 1. It is for the benefit not only of uninsured owners of ships and cargoes in peril, but also of insurers of such ships and cargoes that they shall be saved, and that no obstacle shall be thrown by judicial decision in the way of those who are ready and willing to save ships and cargoes in distress. 2. The interest of owners of ships and cargoes and their insurers is in fact the interest of the public, and therefore it is for the interest of maritime commerce in general, and of the public in general, that the masters of ships should be at liberty to succor other ships in distress, without fear of loss of freight or liability for loss of cargo or loss of claims on insurers. Up to a certain point, the principles here suggested may be conceded. Indeed, they are recognized by the laws of all civilized countries. The whole law of salvage is based upon them; for, salvage is awarded to those who, being under no obligation to exert themselves to save ships and cargoes in peril, do so exert themselves successfully. The question I have to decide is, whether by the law of this country the owner of a ship deviating to save property is exonerated from the ordinary consequences of deviation.

In order to answer this question, it will be convenient to consider the interests of the various parties immediately affected by such a deviation. 1. As regards the mariners,—their right to salvage is a sufficient inducement to them to succor ships in distress. 2. The owner of the succoring ship shares the salvage, and the salvage is always proportionate 320] to the risk run; and one \*of the risks run by the owner of the succoring ship is, possible loss of freight, loss of benefit of insurance, and possible liability for loss of cargo. His remuneration, therefore, in the shape of salvage (if any is earned) indemnifies him against all risks incurred by him by the deviation of his ship. 3. The owner of cargo, if the cargo be lost after a deviation, has his remedy against the shipowner. The owner of cargo has, therefore, really no interest in the question under discussion, unless the shipowner be insolvent, which is too rare an event to influence a general rule, and which when it occurs may be exceptionally dealt with. 4. Unless under very special circumstances, the owner of cargo on board the saving ship does not share salvage; and it would be most unjust to hold that the risk to his cargo might be increased by salvage services, when he obtains no benefit whatever from the salvage awarded for them. 5. The same observation applies to the underwriters of the saving ship and her cargo. Their risk is increased by the supposed deviation, but they do not share the salvage

awarded for it. 6. The interests of the owners of the saved ship and cargo, and of the respective underwriters thereof, are protected by the inducement afforded by salvage to those who hazard their lives and ships to save ships and cargoes in peril of destruction.

The above considerations show that the owner of the deviating ship is only exposed to risk without remuneration when no salvage is earned: but, to protect him in such a case at the expense of owners of cargo and underwriters, i.e., by increasing their risks without even the hope of remuneration, would be in the highest degree unjust to them. Moreover, it would be most dangerous to hold that masters of ships may for reward or the hope of reward deviate with impunity in order to save property. Such a doctrine would open wide the door for the entrance of fraud; and would tempt masters to enter into secret agreements for their own benefit, and to conceal them if all went well, and, if not, then to set up as an excuse for their conduct a deviation to save the property of others.

The reasons against an extension of the doctrine of permitted deviation to save property appear to me far to outweigh the reasons in its favor. To permit deviation to save life is an anomaly, justified by reasons which have no application whatever \*to deviation to save property: and [321 on principle, therefore, I decline to extend the doctrine as desired by the defendants. I do this the more readily as the propriety of so extending it has been considered before now, and been uniformly negatived by those who have had to consider it. I have, in order to decide this case, availed myself of every assistance within my reach. Every text-writer I have consulted,—including Arnould, Phillips, Kent, and Parsons,—is in favor of the conclusion at which I have arrived; and the reasoning of Mr. Justice Washington, in *Bond v. The Brig Cora* (1), in support of the same view, appears to me unanswerable. Still, as this is the first case in this country in which the point I have to decide has arisen and required a distinct decision, I have thought it desirable to give the reasons for my opinion at greater length than I should otherwise have done.

I was informed at the trial that this was in substance an action by underwriters against underwriters, and that the particular underwriters who bring this action are acting contrary to the views and wishes of other persons in the same interest as themselves. Be it so: it is nevertheless plain that all I have to deal with are the rights of the plain-

(1) 2 Wash. C. C., 80.

1879

Tozer v. Lake.

tiffs as owners of cargo against the defendants as owners of the ship *Olympias*. Those rights depend on the charterparty; for, the bills of lading do not vary from it, and are to the same effect. I have nothing to do with any policies, and know nothing of their language. By the charterparty, the defendants became liable to the plaintiffs for the loss of their cargo, unless such loss was within one of the excepted perils. The excepted perils, although covering perils of the sea, did not cover such perils, if subsequent to an unauthorized deviation: *Davis v. Garrett* ('). The deviation in this case was in my opinion unauthorized; and I therefore give judgment for the plaintiffs for such a sum as may be found to be due by a referee, it having been arranged that the actual figures shall be referred to a gentleman to be agreed upon. The costs of the action must be borne by the defendants.

*Judgment accordingly.*

Solicitors for plaintiffs: *Waltons, Bubbs & Walton*.

Solicitors for defendants: *Crumph & Son*.

(') 6 Bing., 716.

[4 Common Pleas Division, 322.]

May 16, 1879.

### 322] \*TOZER, Appellant; LAKE, Respondent.

*Bastardy—Application for Summons by a Married Woman—35 & 36 Vict. c. 65, ss. 3, 4.*

A bastardy order under 35 & 36 Vict. c. 65, cannot be made where the mother has married since the birth of the child, and is at the time of the application living with her husband, although she took out a summons against the putative father before her marriage, and was prevented from serving it by his default.

See 22 Eng. Rep., 286 note; *Guardians, etc., v. Tompkinson*, *post*, p. 585.

Legitimacy is presumed, and where there has been opportunity for intercourse between husband and wife, within such a period that a child born of the wife may be legitimate, there must be strong evidence to overcome the presumption and to disprove the fact of their intercourse: *Egbert v. Greenwalt*, 44 Mich., 245; *Strode v. Magowan*, 2 Bush, 621; *Kleinert v. Ehlers*, 38 Penn. St. R., 439.

In an action for damages for criminal conversation, the testimony of the husband and wife is inadmissible to disprove intercourse between themselves, for the purpose of raising a pre-

sumption against the legitimacy of the wife's child: *Egbert v. Greenwalt*, 44 Mich., 245.

A limited divorce, on the ground of desertion, does not rebut the presumption of legitimacy of a child of the wife who was frequently visited by the husband. The legal presumption of sexual intercourse must be rebutted by evidence plainly showing non-access by the husband, so that he could not, in the order of nature, be the father of the child: *Kleinert v. Ehlers*, 39 Penn. St. R., 439.

Where the legitimacy of a person is in question, the declarations of his mother are admissible, after her death, being connected with the question of



pedigree; if not made *post litem motam*: *Caujolle v. Ferris*, 26 Barb., 177, 9 Abb., 393, 23 N. Y., 90.

The mother of a child, her husband the alleged father being dead, is a competent witness upon the question of legitimacy.

When the point in issue is the legitimacy of a child, evidence offered to prove the bad character of the mother for chastity during the lifetime of the husband, and before the birth of the child, is incompetent. But evidence offered to show her bad character for truth, is competent: *Warlick v. White*, 76 North Car., 175.

In Iowa, on the trial of an indictment for seduction, the infant alleged to be the fruit thereof, but *three months* old, cannot be offered in evidence to corroborate the prosecutrix, by reason of a supposed resemblance between the child and the defendant: *State v. Danforth*, 48 Iowa, 43.

But in *State v. Smith*, 11 Cent. L. J., 54, a child two years old was allowed to be exhibited to the jury, the court distinguishing the cases thus: "The defendant claims that any resemblance, if it should be thought to exist between such a child and a man alleged to be its father, is too unreliable to constitute legal evidence of the alleged paternity. It is a well known fact that resemblances often exist between persons who are not related, and are wanting between persons who are. Still, what is called family resemblance is sometimes so marked as scarcely to admit of a mistake. We are of the opinion, therefore, that a child of the proper age may be exhibited to a jury as evidence of legal paternity. Precisely what should be deemed the proper age we need not determine. It was held in *State v. Danforth*, 48 Iowa, 43, that it was error to allow a child three months old to be exhibited. That case is relied upon by the defendant in this. But a child which is only *three months* old has that peculiar immaturity of features which characterizes an infant during the time it is called a babe. A child *two years* old or more has, to a large extent, put off that immaturity. In allowing a child of that age to be exhibited, we think the court did not err," especially as it instructed the jury that if they did not clearly see such resemblance, they should disregard all

claims of resemblance on the part of the State: 54 Iowa, 104.

In the trial of an action involving the legitimacy of a child, who is alleged to be of mixed blood, it is not improper to exhibit such child to the jury: *Warlick v. White*, 76 N. C., 175.

On a question of disputed paternity, evidence of personal resemblance between the child and its alleged father is admissible: *Baget v. Baget*, L. R., 1 Irish, 309, 311-12.

*Contra*: *State v. Bowles*, 7 Jones (N.C.) Law, 579; *U. S. v. Collins*, 1 Cranch, C. C., 592.

The fact as to whether or not the prosecuting witness had become pregnant by means of sexual intercourse had by her with others than the defendant, and her declarations in relation thereto, are immaterial and irrelevant on the trial of a defendant indicted for incest, either for the purpose of impeaching her testimony or for any other purpose: *Kidwell v. State*, 63 Ind., 384.

Evidence that the complainant, in a bastardy process, had criminal intercourse with a man other than the respondent, less than seven and a half months before the birth of her child, is inadmissible in the absence of evidence that the child was premature: *Ronan v. Dugan*, 126 Mass., 176.

A question propounded to the relatrix, upon cross-examination, in a bastardy proceeding, as to whether she had stated to C. at a certain time and place, that a person other than the defendant had had intercourse with her, but not fixing the time of the supposed intercourse at such period as would make it probable that such person was the father of the child, is not competent, as such witness could not be impeached by contradicting her statements upon matters immaterial to the issue. In such case, a question propounded, upon cross-examination, to the relatrix as to whether she had stated to C. at a certain time and place that, if anything ever happened to her, she intended to lay it on the defendant as he had plenty of money, is proper to lay a foundation for impeachment, and being asked on cross-examination, the defendant was not bound to state to the court what answer he expected to get from the witness: *Meyncke v. State*, 68 Ind., 401.

In a proceeding under the bastardy

1879

Parry v. Smith.

act, the paternity of the child is the material fact to be found by the jury; and this fact it must find as upon evidence placing it *beyond reasonable doubt*.

Upon the evidence in this case, this court holds it impossible to determine, beyond a reasonable doubt, whether B., the plaintiff in error, or one X., was the father of the child, it appearing from the evidence of the prosecutrix that she had intercourse with X. about two weeks after her intercourse with B., and that the child was born within thirty-seven weeks after the earlier intercourse, and the judgment upon a verdict against B. is reversed on that ground: *Baker v. State*, 47 Wisc., 111.

In an action for seduction, the woman seduced cannot be asked on cross-examination, for the purpose of showing her bad character, whether she had not had criminal intercourse with other men, nor for the purpose of impeaching her if she deny it. Where, however, a child is born as the result of the alleged seduction, the question whether or not the defendant is the father of such child, is proper to be considered in assessing the damages,

though nothing can be assessed for its maintenance.

Such question must be tested in the same manner as if the prosecution were for bastardy: and it is competent, therefore, to ask the woman seduced, on cross-examination, for the purpose of showing the paternity of such child, whether she had sexual intercourse with any other person than the defendant about the time the child was begotten: *Smith v. Yaryan*, 69 Ind., 445.

It is competent evidence, to prove one the father of a bastard, that about the time of its birth he asked a witness whether he knew of a nurse for the child, if he could make a settlement of the case: *Phillips v. Hoyle*, 4 Gray, 568.

Where the defendant, in an indictment for procuring an abortion, had obtained from the prosecutrix her sworn certificate to the effect that he had not held improper relations with her, etc.; held that the certificate, when in evidence, on the part of the defendant, did not conclude the Commonwealth: *Commonwealth v. W.*, 3 Pittsb. Rep., 462, 466-7.

---

[4 Common Pleas Division, 325.]

May 31, 1879.

325]

\*PARRY V. SMITH.

*Negligence—Article of Dangerous Nature—Contractor—Misfeasance.*

The defendant, a gas-fitter, was employed by the plaintiff's master to repair a gas-meter upon his premises, and for the purpose of doing so took away the meter and in lieu of it made a temporary connection by means of a flexible tube between the inlet pipe and the pipe communicating with the house. The plaintiff having gone in the ordinary performance of his duty with a light into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded and injured him.

The jury found that the work had been negligently done, and that the injury to the plaintiff proceeded entirely from such negligence:

*Held*, that the defendant was liable.

THIS was an action brought by the plaintiff to recover damages for an injury sustained by him in consequence of the alleged negligence of the defendant in doing work of a dangerous character upon premises on which the plaintiff was employed as a servant. The case was tried before Lopes, J., at the London Sittings in 1878, and was argued upon further consideration in Hilary Sittings, 1879, by *Finlay* and *Gore*, for the plaintiff, and by *Waddy*, Q.C., *Oppen-*

heim and Bradford, for the defendant. The facts and the arguments of counsel are very fully set out in the judgment.

The following authorities were cited:

For the plaintiff,—*Farrant v. Barnes* (1); *Corby v. Hill* (2); *Gladwell v. Steggall* (3); *Martin v. Great Indian Peninsular Ry. Co.* (4); *Marshall v. York, Newcastle and Berwick Ry. Co.* (5); *George v. Skivington* (6); *Southcote v. Stanley* (7); *Rapson v. Cubitt* (8).

For the defendant,—*Winterbottom v. Wright* (9); *Longmeid v. Holliday* (10); *Collis v. Selden* (11); *Blackmore v. Bristol and Exeter Ry. Co.* (12); *Robertson v. Fleming* (13).  
*Cur. adv. vult.*

\*May 31. LOPES, J.: This action was brought by [326 the plaintiff to recover damages in the following circumstances: The plaintiff was in the employ of Messrs. Moses & Son, as one of their housekeepers. The defendant was a gas-fitter employed by Moses & Son to repair a gas-meter in a cellar belonging to Moses & Son on the premises where the plaintiff was employed. The defendant found it necessary to take away the meter to repair it, and replaced it by a temporary connection consisting of a flexible tube, one end of which was pushed into the inlet pipe and the other end into the pipe communicating with the house. The ends of both the pipes were bound round with rags and string and putted up, and a drawer was put under the curve of the tube so as to support it and take the weight off the fastenings. After the temporary connection had been so placed by the defendant, and he had gone away, the plaintiff, whose duty it was to turn on and light the gas in the cellar, went there for the purpose with a light. Directly the plaintiff opened the cellar door an explosion took place, and he was knocked down and seriously injured.

There was a large body of evidence called on both sides; the plaintiff's evidence going to show that the mode of connection was unsafe; the defendant's that it was safe. It was agreed that the damages, if the plaintiff recovered, should be £50.

I left three questions to the jury,—first, was the defendant negligent in doing the work,—secondly, did the accident proceed entirely from the defendant's negligence,—

(1) 11 C. B. (N.S.), 558; 31 L. J. (C.P.), 137.

(2) 4 C. B. (N.S.), 556; 27 L. J. (C.P.), 218.

(3) 5 Bing. N. C., 738.

(4) Law Rep., 3 Ex., 9.

(5) 11 C. B., 655; 21 L. J. (C.P.), 34.

(6) Law Rep., 5 Ex., 1.

(7) 1 H. & N., 247; 25 L. J. (Ex.), 339.

(8) 9 M. & W., 710.

(9) 10 M. & W., 109.

(10) 6 Ex., 761; 20 L. J. (Ex.), 430.

(11) Law Rep., 3 C. P., 495.

(12) 3 E. & B., 1035; 27 L. J. (Q.B.), 167.

(13) 4 Macq., 167.

1879

Parry v. Smith.

and, thirdly, was the plaintiff also negligent, and was his negligence such that but for his negligence the accident would not have happened. I told the jury that, if they answered both the first questions affirmatively, they need not consider the third. The jury answered these questions in the affirmative, and found a verdict for the plaintiff for £50.

Mr. Waddy at the end of the plaintiff's evidence had submitted that there was no case for the jury. I thought there was, and did not stop the case, but said I would reserve judgment and consider the points of law. I also consented to make any amendments which might be necessary to raise the real question between the parties.

Subsequently the points of law were argued before me. 327] Mr. \*Waddy contended, on the part of the defendant, that there was no cause of action, unless there was privity between the plaintiff and the defendant, or unless what was done by the defendant amounted to a public nuisance, or unless there had been on the part of the defendant fraud, misrepresentation, or concealment. It was contended by Mr. Finlay, on the part of the plaintiff, that the action would lie, because the defendant knew he was dealing with gas, a thing highly dangerous in itself unless great care and caution were used in its management; that the plaintiff's right of action was founded, not on contract, but on the duty which attaches to the use or dealing with a thing in its nature highly dangerous and likely to cause damage, unless managed with great care and caution.

I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to by-standers. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract.

It is strange that there is no direct authority on the point. A large number of cases were cited, but none of them directly in point. The case of *Collis v. Selden* (1) was relied on by Mr. Waddy in argument. This was a demurrer to a declaration; and it was held that the declaration was bad, because it did not disclose any duty by the defendant towards the plaintiff for the breach of which an action would lie. Willes, J., in his judgment, seems to have contemplated an

(1) Law Rep., 3 C. P., 495.

action like the present; for, he says: "The declaration is not founded upon any duty of the occupier to protect persons lawfully coming there against any hidden danger of which the defendant knew or ought to have known, but is founded on alleged carelessness in doing an act, viz., hanging a chandelier. The chandelier is to be regarded as movable property; and the declaration should have shown either that it was *a thing dangerous \*in itself* and likely [328 to do damage, or that it was so hung as to be dangerous to persons frequenting the house."

*Rapson v. Cubitt* (1) is in point. There, the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club house, including the preparation and fixing of gas-fittings. He made a sub-contract with B., a gas-fitter, to execute part of the work. In the course of doing it, through B.'s negligence the gas exploded, and injured the plaintiff, who was the butler of the club. It was held that the defendant was not liable, on the ground that B. was not his servant, but an independent sub-contractor. It seems, however, to have been assumed that an action against B. would have been maintainable.

All the other cases cited are distinguishable from this case. They are not cases where the alleged cause of action is in respect of a breach of duty in using or dealing with a thing in its nature dangerous and likely to cause injury unless great care is used.

There must be judgment for the plaintiff for £50 and costs.

*Judgment accordingly.*

Solicitor for plaintiff, *E. W. Parkes.*

Solicitors for defendant: *Wild, Brown & Wild.*

(1) 9 M. & W., 710.

See 1 Eng. Rep., 204 note; Moak's Van Santvoord's Pl., 340.

One conducting a business which is not *per se*, or in the manner of conducting it, a nuisance, *on his own premises, or where he may lawfully be for the purpose*, is not liable for damages resulting therefrom in the absence of proof of negligence on his part.

The city of Philadelphia has the right to manufacture illuminating gas, and distribute it through her streets, said right being implied from her statutory power to legislate with reference to lighting the said streets: *Strawbridge v. Philadelphia*, 13 Reporter, 216.

The distribution of illuminating gas

through mains laid under the streets of a city is not a nuisance *per se*, and where an explosion of gas which has escaped takes place, injuring property in the neighborhood, the owner of the gas main will not be liable for said injury, unless shown to have been negligent, either in the selection, placing, or care of the pipes, or in the management of the gas: *Strawbridge v. City of Philadelphia*, 13 Reporter, 216.

Where one illegally and for his own purposes makes an excavation under the street in front of his own premises, thereby removing the earth which before stood between said premises and a gas main in said street, and the gas escapes, penetrates the premises, and

1879

Parry v. Smith.

there explodes, he will be held to have contributed to the injury, and cannot recover therefor: *Strawbridge v. City of Philadelphia*, 13 Reporter, 216.

The owner of a house cannot maintain an action against a gaslight company for an injury to his reversionary interest, caused by the negligence of the company in permitting gas to escape into the house, if the immediate cause of the injury was the explosion of the gas by the negligence of a tenant in possession of the house: *Bartlett v. Boston, etc.*, 117 Mass., 533.

But see *Bartlett v. Boston, etc.*, 122 Mass., 209.

In an action against a gaslight company for injuries sustained while escaping from a burning building in Boston, on the night of November 10, 1872, the fire being caused by an explosion of gas, there was evidence, on the issue, of the defendant's negligence, that the great fire of November 9, 1872, though under control, was still burning; that the mains and pipes of the defendant were broken by the fall of heavy buildings, causing leakage; that gas was escaping throughout the burnt district; that explosions were frequent; that gas accumulated in sewers and cesspools in dangerous quantities; that the defendant, notwithstanding the gas escaped as constantly as it was manufactured, continued to manufacture it through the day of November 10th; that the streets in the vicinity were filled with rubbish from the falling walls; that on the morning of November 10 the defendant was notified by the porter of the building that gas was escaping, and especially from the next building; and that the defendant had a large number of valve boxes in the vicinity, which were not closed; but there was no evidence that the fire was caused by the leak, of which the defendant was notified in the morning, or that, by shutting the valves in the vicinity, the escape of gas would have been stopped, or that it was practically possible to get at the valves for that purpose. Held, that negligence could not be inferred from the happening of the accident; and that, on this evidence, the jury would not be warranted in finding that the defendant was guilty of negligence: *Hutchinson v. Boston*, 122 Mass., 219.

In an action against a gaslight com-

pany to recover damages for an injury to the plaintiff's health, caused by an accidental escape of gas at a point several hundred feet distant from his house, from a main pipe in a public street, from which it passed through a public sewer and a private drain, under another street, through which gas pipes were not laid, into the plaintiff's cellar, if it appears that there was, at the outset, no want of care on the part of the defendants in laying their pipe, and that they had no knowledge that the gas which was escaping had made its way to the plaintiff's house, and by the use of due care could not ascertain the fact, and that as soon as they knew of the leak they used reasonable means to ascertain where it was, and to stop it; the plaintiff cannot recover for damages sustained by him after the time when, in the exercise of due care on his part, he might have given notice to the defendants of the presence of the gas in his house, or procured another place of residence.

In such action, evidence that the plaintiff and other members of his family who occupied the same house had been in good health before the time complained of, and that afterwards they all became ill, and that one of his daughters died, is competent: but evidence in defence that the illness of the plaintiff and his family was typhoid fever; that prior occupants of the same house had been much afflicted with illness of the same class; that many families had removed from it on that account; that its location was low and upon made land; and that it was generally regarded and reputed to be unhealthy, is incompetent: *Hunt v. Lowell Gaslight Co.*, 1 Allen, 343.

If the employment of a person by a gaslight company to let on gas into houses has ceased, merely permitting him to continue to let on the gas, at the request of consumers, will not render the company responsible for an injury arising from an explosion of gas which had escaped into a room by reason of his carelessness in omitting to close the end of a gas pipe therein before letting on the gas, provided the person injured had notice that his employment by the company for that purpose had ceased: *Flint v. Gloucester Gaslight Co.*, 9 Allen, 552.

A company which produces and fur-

nishes gas is bound to use such skill and diligence in its operations as is proportionate to the delicacy, difficulty, and nature of that particular business. Upon the trial of an action for damages resulting from an explosion of gas, the question as to whether such diligence was used should be left to the jury; and where the facts in evidence would justify the inference of negligence, to order a nonsuit was error: *Chisholm v. Atlanta Gaslight Co.*, 57 Geo., 28.

A gas company, being in charge of a dangerous material, is itself to use due care proportioned to the risk, and also to use similar care in preventing careless interference with its pipes by others: *Butcher v. Providence, etc.*, 12 R. I., 149, 18 Alb. L. J., 372; *Smith v. Boston, etc.*, 129 Mass., 318.

A lessee may maintain an action against one who has laid gas pipes in neighboring streets so imperfectly that gas escapes therefrom through the ground and into the water of a well upon premises hired and used by him for a livery stable, and thereby renders it unfit for use, and makes the enjoyment of his estate less beneficial, although the nuisance may have existed in a less degree when the premises were hired; and may recover for the inconvenience to which he has thereby been subjected, and expenses incurred in reasonable and proper attempts to exclude the gas from the well, but not for injury caused by allowing his horses to drink the water after he knew it was corrupted by gas: *Sherman v. Fall River, etc.*, 2 Allen, 524.

The plaintiff below, Robinson, in the course of his duties as city engineer of Oil City, entered a sewer with a lighted lantern. Gas from a broken pipe belonging to defendant company had penetrated the sewer. An explosion took place, whereby the plaintiff received injuries of a serious character.

Held, 1. That the company was responsible for what might in the nature of things occur from its neglect, and its responsibility was not limited by what its officers may have thought to be improbable or even impossible.

2. That it was bound for the consequences of its neglect, though those consequences were not and could not, by any ordinary prudence, have been anticipated, whilst the plaintiff was bound only to a knowledge of the

probable consequences of the facts of which he was cognizant, and to that ordinary prudence which the circumstances required.

3. If plaintiff knew that gas was escaping, and that it was probable it would find its way into the sewer in sufficient quantities to produce an explosion, he ought to have anticipated the result, and not entered the sewer with a light. And if he did so under such circumstances it was such contributory negligence as ought to have prevented his recovery in this action: *Oil City Gas Co. v. Robinson*, 18 Lanc. Bar, 114, Supreme Court, Penn.

It seems that where a gas company, upon discontinuing its supply of gas to a customer, and removing the meter, fails to close the service pipe so as effectually to exclude the gas from the building, it is guilty of an omission of duty, and is liable for any damages caused solely by such neglect.

In an action to recover damages alleged to have been occasioned by such neglect, it appeared that plaintiff had been for a long time aware that the gas had escaped, and was escaping into his cellar; he sent servants into the cellar, with a light, and an explosion occurred, doing the injury complained of; the cellar was seldom used, and had not been opened for five days before the accident. Held, that the evidence was sufficient to sustain a finding of contributory negligence on the part of plaintiff; that he would be presumed to know the inflammable and explosive qualities of the illuminating gas in ordinary use; that the escaping gas would necessarily accumulate in a cellar so seldom opened, and the danger of bringing a light in contact with it; and that, for a disregard of this peril, and a neglect to see that the escape of gas was properly prevented, he was responsible.

Also, held, that the fact that, on numerous prior occasions, the cellar had been entered with a light without causing an explosion, did not establish that it was prudent so to do; that whether knowledge of the harmlessness of the prior acts, in going into the cellar with a light, would make that prudent which, but for such knowledge would have been imprudent, was for the consideration of the referee, in connection with the other circumstances,

and did not, necessarily and incontrovertibly, establish that plaintiff was not negligent at the time of the accident so as to make a finding of contributory negligence error as matter of law: *Lannigan v. New York Gaslight Co.*, 71 N. Y., 29.

A gas pipe having by the negligence of the defendant been broken, so that the gas escaped into the plaintiff's cellar, and the plaintiff having discovered that there was a leakage of gas, and having called in a plumber to ascertain where the leak was, and the plumber having, in looking for the leak, entered the cellar with a lighted candle whereby an explosion was caused; held, that the plaintiff was not responsible for the plumber's negligence, and could recover from the defendant for the damage caused by the explosion: *Schermerhorn v. Metropolitan Gaslight Co.*, 5 Daly, 144.

Plaintiff's wife was injured by an explosion of gas, caused by some defect in the gas pipe, in the room of a house rented and recently occupied by plaintiff. The room had previously been used as an office for a factory adjoining, and received its supply of gas from the factory. The factory had for some time been unoccupied, and the gas turned off by the gas company.

Subsequently, and shortly prior to the accident, gas was turned on again at the factory: Held, that the gas company was not liable for the injury, not being liable for the gas pipes inside of any private building: *Tremaine v. Halifax Gaslight Co.*, 2 Russ. & Chesley (Nova Scotia), 394.

In an action against a gaslight company to recover damages for an injury to plaintiff's health, caused by an accidental escape of gas from a main pipe through various sewers and drains into the plaintiff's house, which was one of several tenements in the same block, the plaintiff may show that on the same day when the gas was first perceived, his wife sent notice to the defendants by a neighbor that gas was escaping into that block. If, in such action, the defendants have introduced the evidence of one of their agents to show that after the escape of gas became known he went to the several houses where it was perceived, and amongst others to the house of a neighbor of the plaintiff, and did not find

gas in great or dangerous quantities, no exception lies to the admission of evidence to contradict him, by showing that he informed such neighbor that there was gas enough in his cellar to blow up the house, if he should go down with a light: *Hunt v. Lowell Gaslight Co.*, 3 Allen, 418.

This action was brought against a plumber, for so negligently and improperly making certain repairs in the plaintiff's house as to allow the gas to escape from the sewer into the house, and to seriously injure the health of the plaintiff and that of his family. The complaint further alleged that, in addition to the said injuries, the plaintiff's five children were sickened and poisoned by said gases; that three of them died, after a protracted illness, and that the plaintiff was put to great trouble and expense to provide necessary care, nursing, and medical treatment, both for himself and his said children. The defendant having died after issue joined, the plaintiff moved to have the action revived against his executrix, and for leave to serve a supplemental complaint.

Held, that in so far as the action was brought to recover damages for the injuries occasioned to the plaintiff's person, it abated by the death of the defendant, but that, in so far as it was brought to recover for the damages and expenses occasioned by the sickness of his children, it survived, and should be revived against the defendant's executrix: *Scott v. Brown*, 24 Hun, 620.

In an action against a gaslight company to recover damages for an injury to the plaintiff's health, caused by an accidental escape of gas from a main pipe in a public street, from which it passed through various sewers and drains into the plaintiff's cellar and house, the plaintiff, in connection with evidence tending to show that the defendants did not use due diligence in finding and stopping the leak, after notice thereof, may show by witnesses who passed along the street and lived in the neighborhood of the plaintiff's house at the time, to what extent the gas escaped into the street; and also, that it escaped from the same sewer through which it reached the plaintiff's house into other houses at points beyond, if the defendants had notice thereof, but not otherwise; but he cannot show that



wherever the gas escaped into other houses, sickness followed.

In such action, a witness who is experienced in digging holes through frozen earth may testify how long a time, and how much labor it would take, to dig such holes as have been made through frozen earth by the defendants in searching for the leak, for the purpose of showing whether they have exercised reasonable diligence in finding and stopping the same.

In such action, the defendants may show that the plaintiff made no claim on them for damages for more than two years after the injury complained of; but they may not show that the plaintiff, while sick in bed, in conversation about his sickness, did not then ascribe it to the effects of gas, and said nothing as to the cause of it.

If, in such action, it is made a question whether the inhalation of gas is noxious to health, and it is established that it is so, the belief of the defendants' agent upon the subject is unimportant, for the purpose of affecting the question of the care and diligence which it was their duty to exercise, in order to guard against its deleterious effects.

The plaintiff in such action, in order to prove due care on his part, may not prove that the defendants' agent advised the occupants of a neighboring house, into which gas had escaped from the same leak, what to do to avoid ill consequences from it, and that he did the same things so advised, if such agent gave directions to the plaintiff respecting the matter: *Emerson v. Lowell Gaslight Co.*, 3 Allen, 410.

The Washington Gaslight Company is authorized to use the streets of the city for the purpose of laying gas pipes, but it is the duty of the company to perform the work so that other persons may receive no injury through the negligence of the company, or of its agents, in such use of the public streets.

Where an individual has received an injury by falling into a trench dug in a travelled street and imperfectly filled up, the company will not be relieved from liability therefor, although the work has been approved of and accepted by the officers of the district government.

It is the duty of the company to put the street in as good condition as it had

previously been, and also to exercise a careful foresight, so as to prevent any injury afterward which might be occasioned to the work by storms and rain-falls, and which would render the work dangerous to persons travelling on the street: *Dillon v. Washington Gaslight Co.*, 1 MacArthur, 626.

Where the court was satisfied there was a *bona fide* dispute by the consumer of the quantity of gas claimed by the company to have been consumed by him, and that he was in good faith contesting it, the gas company was restrained by injunction from cutting off his supply of gas: *Sickels v. Manhattan Gaslight Co.*, Daily Register, April 12, 1882, Lawrence, J.

A board of public works of a city is not justified in refusing to supply water for the use of the engines, etc., of a railroad being operated by a receiver under the direction of the court, on the ground that certain water-rents which were due when the railroad was declared insolvent are unpaid: *Coe v. New Jersey U. R. R. Co.*, 30 N. J. Eq., 440.

See also *Sheffield v. Wilkinson*, *post*, p. 634.

A gas company, incorporated under the Cons. Stats., ch. 65, having made a charge for a special illumination, which was disputed as excessive, refused to supply gas to the same premises for ordinary purposes until their claim had been paid: Held, that they were not justified in taking this course, but that a mandamus would not lie as the statute imposed no duty, and that the only remedy was by action: *In Matter of Commercial Bank and London Gas Co.*, 20 Upp. Can. Q. B., 233.

A company incorporated under the provisions of the statute 16 Vict., ch. 173, for supplying a city with gas, will be restrained during the currency of a quarter, from cutting off the gas from a house, the occupant of which has paid up the rent for the preceding; but a special contract for continuing to supply the gas will not be binding on the company, unless in writing under the corporate seal: *Smith v. London Gas Co.*, 7 Grant's Chy., 112.

The right of the appellants (a gas company), under the act of 1859 (Sess. Laws of 1859, ch. 311, § 9), to shut off the gas from the premises of a person who is a customer, and has made the

deposit required, depends wholly upon the fact as to whether or not that person is in arrear for gas furnished by the company; and that is a question of fact to be determined by evidence, and not by the will or conclusion of the company.

But the right of the company to shut off the gas does not extend to arrears for gas created by former occupants of the premises.

Where loss of profits are claimed and to be estimated as damages, the rule of law confines such loss to the immediate cause or breach of the contract, or omission of duty. If it cannot be traced directly to such breach, or omission, it is regarded as too remote, uncertain and unreliable, to form the basis of damages for which a recovery can be had: *Lacour v. Mayor*, 3 Duer, 406; *St. John v. Mayor*, 6 id., 815.

In the case at bar, it was held, on appeal, that it appeared from the evidence on the trial, that the loss of profits was too remote, uncertain and unreliable, to form a basis for the damages, found by the verdict of the jury: *Morrey v. Metropolitan Gaslight Co.*, 38 N. Y. Supr. Ct. R., 185.

This court has authority to grant a mandamus directing a gas company to furnish gas to persons who, under the provisions of its charter, have a right to receive it, and who offer to comply with the general conditions on which the company supplies others.

Gaslight companies possess, by virtue of their charters, powers and privileges which others cannot exercise, and the statutory duty is imposed upon them to furnish gas on payment of all moneys due from applicants.

If an applicant is already indebted to a gas company, the company may shut off the supply of gas and refuse to furnish any more, especially if he avows his insolvency and his inability to pay for gas previously furnished.

Where an individual applies to a gas company for gas, and the same is furnished to him by the company for a period without objection on account of a former indebtedness, this will not deprive the company of the right to reject a subsequent application on the ground of such indebtedness: *People v. Manhattan Gaslight Co.*, 45 Barb., 136.

Motion for a peremptory mandamus.

This application should be denied. 1. Because the relator has not made the application in writing for the supply of gas, which is a prerequisite under the statute to his legal right to demand such supply (3 Edm. Stat. at Large, 856, 857, § 6). 2. Because it appears from the affidavits read in opposition to the motion that a portion of the relator's premises are not within one hundred feet of the mains of the respondents (See Bradley's affidavit, Statute, *supra*, § 6). 3. Because it appears that the respondents have sold and transferred to the New York Light Company all their mains, pipes, etc., lying south of the middle of Grand street. I do not find that there is any provision of law which prohibits such a sale or transfer, and as the relator's building is within the district thus transferred, it seems to me that the relator has failed to establish that clear legal right to the thing demanded, which must always be shown to exist before the writ of mandamus can be granted. 4. Because it appears that the relator is now being supplied with gas by the New York Gaslight Company. 5. Because the relator has a complete remedy by action for any damages which he may have sustained by reason of the respondents' sale or transfer of their mains south of Grand street to the New York Gaslight Company. Motion that a peremptory mandamus be granted, denied: *Coogan v. Municipal Gaslight Company*, 2 N. Y. Monthly Law Bulletin, 79.

As to the duty of a water company to furnish water to all who apply, and for public purposes, etc., and rights of consumers and citizens, see *Spring Valley, etc., v. San Francisco*, 52 Cal., 111; *Spring Valley, etc., v. Bryant, Id.*, 132.

In an action by a gas company against a consumer of their gas, it was held that had it been shown that the company had placed on defendant's premises a meter duly verified and stamped, the indication of it, subject only to being tested and corrected in the manner pointed out by the legislature, would be conclusive upon the parties; but that defendant was not bound by an unverified meter: *St. John's Gaslight Co. v. Clarke*, 1 Pugsley & Burbidge (N.B.), 307.

Where it does not appear in evidence in an action for gas that the meter has

been inspected or sealed, the meter cannot be legally used, and is no evidence of the quantity of the gas used: *Mannhattan, etc., v. Flamme*, 12 N. Y. Weekly, 245, N. Y. Com. Pl.

As to consolidation of two gas companies operating to forfeit their rights or charters for the benefit of the public, see *St. Louis v. Gaslight Co.*, 5 Mo. App., 484.

[4 Common Pleas Division, 329.]

March 29, 1879.

**\*HILL and Others v. WILSON and Others. [329]**

*Shipping—Average Adjustment at a Port of Refuge—Pro Rata Freight*

The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not, as between the shipowner and the owner of cargo, warrant an average adjustment at the intermediate port.

To entitle a shipowner, in the absence of a special contract, to demand *pro rata* freight, where the goods have been sold at an intermediate port (being so much damaged as not to be worth forwarding), it must be shown that the owner of the goods had an option of having them sent on or of accepting them at such intermediate port.

A ship sailed from Riga for Hull with a general cargo and was stranded, but was afterwards got off (part of the cargo having been washed out of her and part jettisoned) and towed into Copenhagen, where her cargo was discharged, and the ship, having been repaired at considerable expense, was sent on to Hull after a delay of about two months, with some of her cargo on board, other part having been sent on by the master in other vessels. The plaintiffs' goods were so much damaged as not to be worth sending on, and were (properly, but without the plaintiffs having an opportunity of exercising an option) sold at Copenhagen, and an average adjustment took place there according to Danish law, under which the plaintiffs were charged with *pro rata* freight from Riga to Copenhagen.

In an action for the price realized by the sale at Copenhagen:

*Held*, that the shipowners were not entitled to deduct the general average expenses ascertained by the adjustment at Copenhagen, nor *pro rata* freight.

THE plaintiffs in this action are the indorsees of certain bills of lading of goods shipped in November, 1876, at Riga, on board the *Virago*, for carriage to and delivery at Hull. The defendants are the owners of that ship.

The *Virago* sailed from Riga with a general cargo, and was stranded and injured. Part of her cargo was saved; part was washed out and lost; and part was jettisoned, and in respect of this part a claim for general average arose. The ship was got off, and was towed into Copenhagen on the 9th of December, 1876. Her cargo was there discharged on the 3d of January, 1877. She was repaired at a large expense between the 13th and 31st of January, and on the 7th of February was sent on to Hull, where she arrived on the 10th.

The plaintiffs' goods arrived at Copenhagen, but, being much damaged, were there sold; and it is admitted that they were properly sold. The present action is brought for

1879

Hill v. Wilson.

330] the amount realized \*by the sale, after deducting such charges and general average expenses as the defendants would be entitled to deduct by English as distinguished from Danish law. As a matter of fact, the general average expenses had been ascertained at Copenhagen. The average had been thus adjusted according to Danish law; and the adjuster had charged the plaintiffs with *pro rata* freight from Riga to Copenhagen. The result was more favorable to the defendants than would have been the case if the adjustment had been made according to English law; and the defendants claimed to deduct from the proceeds of the sale of the goods a larger sum than the plaintiffs considered them to be entitled to. The defendants paid £1,460 4s. 9d. into court; and it was admitted that that sum was sufficient if the defendants were correct in their contention. It was also agreed that, if they were in the wrong, the accounts should be referred to some third person for readjustment.

The *Virago's* cargo, when she left Riga, consisted of 1,893 tons of goods: of these, 30 tons were jettisoned, and 1,643 were sold at Copenhagen. There then remained 220 tons. Of these, part was forwarded by the *Mito* on the 13th of December, 1876, part by the *Otto* on the 31st of January, 1877, and part by the *Mito* on the 31st of January, 1877. The rest (amounting to 127 tons) came to Hull in the *Virago* herself. The *Mito* and the *Otto* both belonged to the defendants; and full freight (by which was understood the full original freight from Riga) was paid for that part of the cargo which came home in them. Full freight was also paid for so much of the 127 tons brought home in the *Virago* as did not belong to the defendants themselves. But about 50 out of these 127 tons consisted of lathwood which had been abandoned to the defendants as underwriters thereof; and in respect of these 50 tons no freight was payable.

The cause was tried before Lindley, J., at the Michaelmas Sittings, 1878, when a verdict was found for the plaintiffs, and was heard upon further consideration on the 19th of December, 1878, and the 29th of March, 1879.

*J. C. Mathew* (*Butt*, Q.C., and *Watkin Williams*, Q.C., with him), for the plaintiffs, contended that the adjustment 331] should have been \*made at Hull, the ship's port of destination, and not at Copenhagen, the ship being a British ship, the bill of lading being an English bill of lading, and the goods being deliverable in England; and that the defendants had no right to deduct *pro rata* freight, which is only recoverable when provided for by the bill of lading.

He referred to *Simonds v. White* <sup>(1)</sup>; 2 Arnould on Insurance, 5th ed., 872; and Benecke on Indemnity, ed. 1824, p. 326.

*Edwin Jones* (*Webster*, Q.C., with him), contended that the adjustment was properly made at Copenhagen, where there was practically an abandonment of the voyage, a complete change of the adventure, and where the sale of the bulk of the cargo took place with the assent of all parties interested; and that the shipowners were entitled to *pro rata* freight. He cited *Fletcher v. Alexander* <sup>(2)</sup>; *Marro v. Ocean Marine Insurance Co.* <sup>(3)</sup>; 1 Parsons on Shipping, 465; 2 Parsons, 366; 2 Phillips on Insurance, 5th ed., § 1414.

*Cur. adv. vult.*

March 29. LINDLEY, J., after stating the facts at *ante*, p. 329, delivered judgment as follows:

It thus appears that the ship with part of her original cargo on board arrived in Hull, the original port of discharge, and that the defendants received the original full bill of lading freight for such cargo, except for that part of it which belonged to themselves and paid no freight.

A long correspondence was put in evidence, and was referred to; and I have read the whole of it. That correspondence and the defendants' answers to the plaintiffs' interrogatories show,—1. that the cargo forwarded from Copenhagen was forwarded by the instructions of the consignees or the underwriters,—2. that the whole of the undamaged cargo might have been brought on to Hull in the *Virago* herself after she had been repaired,—3. that the plaintiffs never assented to, but always protested against, an adjustment of the average at Copenhagen.

Under these circumstances, I am of opinion that it is incumbent \*upon the defendants to show that the [332 Danish adjustment is binding upon the plaintiffs; it is incumbent on the defendants to show that the voyage was terminated at Copenhagen by the occurrence of circumstances which necessitated or justified such termination, and, as a consequence, necessitated or justified a general average adjustment at that port.

Very little information is to be obtained upon the question what circumstances terminate a voyage at an intermediate port, when the ship with part of her cargo on board arrives at her original port of discharge. The only cases reported

<sup>(1)</sup> 2 B. & C., 805.

<sup>(2)</sup> Law Rep., 3 C. P., 375.

<sup>(3)</sup> Law Rep., 9 C. P., 595; 10 Eng. R., 325; Law Rep., 10 C. P., 414; 12 Eng. Rep., 473.

in our own books on this point are *Fletcher v. Alexander* <sup>(1)</sup> and *Mavro v. Ocean Marine Insurance Co.* <sup>(2)</sup>. In *Fletcher v. Alexander* <sup>(1)</sup> a ship laden with salt sailed from Liverpool for Calcutta. She got ashore, and returned to Liverpool. The whole cargo except 100 tons was lost or so damaged as to be worthless; and the 100 tons were not forwarded. The ship herself after being repaired went on to Calcutta, her original port of destination, but with an entirely new cargo, and in fact on a totally different voyage. It was decided, amongst other things, that, the voyage having been broken up at Liverpool, Calcutta was not the place for adjustment. The arrival of the ship at Calcutta, and the possibility of forwarding the undamaged salt to the same place, did not prevent the court from holding the voyage to have been broken up at Liverpool, and from holding Liverpool to be the proper place for adjustment. In *Mavro v. Ocean Marine Insurance Co.* <sup>(2)</sup>, a ship laden with wheat sailed from Varna for Marseilles. She became disabled, and put into Constantinople. Part of the cargo, which was damaged, was sold there: the rest was transhipped and sent on to Marseilles. The ship was repaired at Constantinople after a lapse of two months; but whether she ultimately proceeded to Marseilles does not appear. The above steps were taken by the direction of the consular court of Constantinople; and under its direction an adjustment of average was made there. This adjustment was made according to the law of France, which under any circumstances was the law applicable to the case. The court held that the voyage had 333] been properly broken up at Constantinople, and \*that the adjustment there was binding, although some cargo arrived at Marseilles and the ship was herself repaired and sent to sea. The real question in this case was the true construction of an English policy of insurance containing the words "general average as per foreign statement;" and the case does not throw much light on any other question.

In this state of the authorities, it is necessary to consider the matter on principle. The duty of the shipowner is, to complete the voyage if he can. If owing to perils of the seas he is compelled to put into an intermediate port for repair, his duty is, to refit, and carry on such part of the original cargo as is fit to be carried on. If this is done, a policy on the ship for the original voyage will cover a loss sustained after she has been repaired and is sailing from the port of repair to her original port of destination; and a

<sup>(1)</sup> Law Rep., 3 C. P., 875.

<sup>(2)</sup> Law Rep., 9 C. P., 595; 10 Eng. R., 325; Law Rep., 10 C. P., 414; 12 Eng. R., 473.

policy on her original cargo will still cover so much of such cargo as is being carried in her between the same ports. In a case of this description, the original voyage is not regarded as broken up into two, viz., first into one voyage from the port of sailing to the port of refuge, and secondly into another voyage from such port to the port of destination.

Again, if the shipowner, being unable to repair his ship, tranships the cargo and sends it home in some other ship, which he may do, still, as between him and the original consignees of the cargo, the original voyage is treated as continuing, in the absence of some agreement to the contrary. This appears from *Shipton v. Thornton* (<sup>1</sup>), where the freight payable in such cases is discussed. Further, in a case of this description, a policy on the cargo for the original voyage will cover such cargo when transhipped in order to complete such voyage: 1 Arnould on Insurance, 2d edition, 491.

These considerations appear to me to show that, in order to uphold the Danish adjustment in this case as against the plaintiffs who have never assented to it, the defendants must prove two things, viz., first, that the original voyage was in fact terminated at Copenhagen, and, secondly, that it was so terminated either by agreement or by necessity, i.e., the occurrence of circumstances beyond the control of the defendants, and such as rendered \*the completion of the [334 voyage on the terms originally agreed upon physically impossible, or so clearly unreasonable as to be impossible in a business point of view.

As a mere question of fact, my opinion is that the voyage did terminate at Copenhagen. With respect to 90 tons of the original cargo, there was no termination whatever of the voyage at that port, but only a suspension of it whilst the ship was under repair. The plaintiffs' goods were no doubt sold at Copenhagen, and as to them the voyage obviously terminated there: but this of itself cannot make an average adjustment there binding on the plaintiffs, as will be seen at once by supposing all the rest of the cargo to have been brought home in the *Virago* after a short detention for repairs.

But, assuming the original voyage to have in fact terminated at Copenhagen, neither the necessity for its termination there nor its termination by any agreement binding on the plaintiffs is proved. The desirability of having the average adjusted at Copenhagen, in order to obtain an allowance of distance freight, and the desirability of bring-

(<sup>1</sup>) 9 Ad. & E., 314.

ing about a separation of ship and cargo in order to obtain an adjustment at Copenhagen, were clearly seen by Hansen, and were pointed out by him to the defendants; and the correspondence satisfies me that the adjustment at Copenhagen was not the consequence of an inevitable breaking up of the voyage there, but was the cause of the voyage being broken up there, so far as it can be said to have been broken up with respect to the ship and the undamaged goods.

The letters which show this to have been the case are as follows: 6th of December, 1876, 19th of December, 1876, 12th of January, 1877, 13th of January, 1877, 15th of January, 1877, 16th of January, 1877, 21st of January, 1877, 22d of January, 1877, and 26th of January, 1877.

In coming to this conclusion, I do not accuse the defendants of bad faith. Their letter of the 13th of January, 1877, and a letter from Mr. Bott to them of the 4th of July, 1877, show that the defendants were under the impression that the proper place for adjusting the average was where the damaged goods were sold, or that the defendants as ship-owners had some option in the matter. This was in my 335] opinion an erroneous view; and, for the \*reasons already stated, I decide that the plaintiffs are not bound by the Copenhagen adjustment.

The defendants, however, contend that, irrespective of this adjustment, they are entitled to charge the plaintiffs *pro rata* freight on their goods which were carried from Riga to Copenhagen and there sold. This contention can only be supported by establishing some contract, express or implied, binding the plaintiffs to pay *pro rata* freight. Express contract there is none; and the only grounds relied upon for implying a contract are that the plaintiffs' goods were sold at Copenhagen with their consent given expressly or impliedly to Hansen, who acted for the best for all parties. But, assuming this to be so, the goods were in fact sold because they were so damaged as not to be worth forwarding; and a sale under such circumstances, whether approved by the plaintiffs beforehand or ratified afterwards by claiming the proceeds of sale, is not enough by English law to render distance freight payable: see *Hopper v. Burness* (1), and the cases there cited. To have that effect, the circumstances must be such as to give the cargo owner an option of having his goods sent on to their destination, or of accepting them at the intermediate port. If, having that option, he accepts the goods at the intermediate port, he is bound to pay *pro rata* freight: see M'Lachlan on Shipping, 2d ed., p. 446.

(1) 1 C. P. D., 137; 16 Eng. R., 482.



But here the plaintiffs had no such option: there was nothing equivalent to a voluntary acceptance by them of the goods at Copenhagen.

Upon both points, therefore, my judgment is for the plaintiffs, with costs,—the amount to be referred to an English average adjuster.

*Judgment accordingly.*

Solicitors for plaintiffs: *Hollams, Son & Coward.*

Solicitors for defendants: *Lowless & Co.*

---

[4 Common Pleas Division, 336.]

May 16, 1879.

*\*In re BRIDLE.*

[336]

*Will, Construction of—Specific Legacy of outstanding Mortgage—Ademption.*

Testator bequeathed to his niece L. B. "the mortgage of £200 which he had secured to him on a mortgage of premises (describing them) belonging to W. H." After the making of the will and before the testator's death, the mortgage debt due to him from W. H. had been paid off:

*Held*, that the specific bequest to L. B. was adeemed, and that the fact of the testator having placed the £200 to a separate account at his banker's, and put the pass-book in which that sum was credited to him in her hands made no difference.

APPEAL from the county court of Dorsetshire holden at Weymouth.

1. This was a petition presented by Louisa Bridle, asking for payment out of court to her of a sum of £200, after deducting the costs of the petition, or for such other order as might be just.

2. John Bridle, late of Melcombe Regis, in the county of Dorset, died on the 28th of January, 1877. By his last will and testament, bearing date the 21st of December, 1872, he bequeathed unto the petitioner Louisa Bridle, all his, the testator's, household goods and effects of every description which might be in and about his, the testator's, dwelling house at the time of his decease; and also the mortgage of £200 which he had secured to him on a mortgage of premises in King Street, Melcombe Regis, belonging to William Hardy: And, after making certain specific devises and also certain pecuniary and other bequests, the testator bequeathed certain messuages and premises in the said will described, together also with all the rest, residue, and remainder of his real and personal estate not thereinbefore disposed of, unto T. Abbott, S. Gale, and T. B. Nicholas,

1879

In re Bridle.

their heirs, executors, administrators, and assigns, according to the nature and tenure thereof respectively, Upon trust to sell the same in manner therein mentioned, and to stand possessed of the moneys arising from such sale or sales, calling in, and conversion into money, together with the moneys that the said testator might be possessed of at the time of his decease not thereinbefore disposed of, upon trust, after payment thereof of all his just debts, funeral, and 337] testamentary \*expenses, and the legacies thereinbefore contained, to divide the same equally between and amongst his, the testator's, sister, Elizabeth Samways, widow of James Samways, and also amongst each and every the child or children of the said James and Elizabeth Samways, and to share and share alike as tenants in common; and, should either of them die before the testator, then the share of the one so dying should be divided equally amongst the survivors. And the said testator also declared that the legacies or shares of such of them as should be married women should be independent of their present or any future husband: and he appointed the said T. Abbott, S. Gale, and T. B. Nicholas, executors of his said will.

3. The said Abbott, Gale, and Nicholas, on or about the 16th of February, 1877, duly proved the will in the Blandford district registry of the Probate Division of the High Court of Justice.

4. Abbott, Gale, and Nicholas, sold, collected, and converted into money, all such parts of the personal estate of the testator as did not consist of money, and divided the whole estate of John Bridle, deceased, in pursuance of the trusts of the will, with the exception of £200 standing to the credit of John Bridle, deceased, on a deposit account at the branch bank at Weymouth of Messrs. Williams & Co. The petitioner caused application to be made to Abbott, Gale, and Nicholas, to transfer and pay over to her the said sum of £200 so standing to the deposit account of John Bridle, deceased; but, owing to doubt as to the right of the petitioner Louisa Bridle to receive and give a discharge for the same, they have paid into the Postoffice Savings Bank at Weymouth the sum of £200, and the same is now standing therein in the name of the registrar of the county court to await an order of court for the payment out or distribution of the said trust fund.

5. Louisa Bridle, on or about the 13th of December, 1878, filed a petition in the county court of Dorsetshire holden at Weymouth, for an order of the court for her, Louisa Bridle, to be paid the said sum of £200 so paid into the said Post-

office Savings Bank as aforesaid, she alleging that she was entitled to the same.

6. Louisa Bridle, the petitioner, supported her case by the affidavit of herself and also of Robert Oakley, bank manager to \*the said branch bank of Williams & Co., [338 and which affidavits were duly filed in the court and were uncontradicted or cross-examined upon; the appellants giving no evidence of any kind or raising any objection to the facts as such, but only as to the inadmissibility in evidence of the facts contained in such affidavits, and allowed their case to depend upon the legal argument of the solicitor who appeared for them.

7. Louisa Bridle, in addition to the beforementioned facts, proved that John Bridle at the time of making his will, viz., the 21st of December, 1872, had a mortgage of £200 secured to him on a mortgage of premises in King Street, Melcombe Regis, belonging to one William Hardy. The mortgage was paid off, and the sum of £200 was paid by the mortgagor to John Bridle on or about the 13th of October, 1873, being about nine months after his will was made.

8. John Bridle banked at the branch bank of Williams & Co., at Weymouth, and had a regular banking account with such branch bank, together with a pass-book: and Robert Oakley, whose affidavit had been filed, was and had been for upwards of fourteen years the manager of such branch bank.

9. When the mortgage money of £200 was on or about the 13th of October, 1873, paid to John Bridle, he took such sum to the said branch bank of Williams & Co. He did not pay it in to his general account, but had the same entered in his name to a separate account which he opened with the bank for that purpose; and he received a separate pass-book from the bank with the entry of that sum only, which book the testator handed into the custody of the petitioner; the testator stating when he did so that it was the money he had received from the mortgage of premises in King Street, Melcombe Regis, and that the petitioner was to keep the book, as he had willed the same to her, for her to receive the same after his death,—meaning the said sum of £200, stating it would show that the money (meaning the £200) was for the petitioner, and would do away with the necessity of altering his will in consequence of the mortgage being paid off as aforesaid.

10. John Bridle allowed the £200 to remain in the bank intact from the time he paid it in down to the time of his

1879

In re Bridle.

decease, and in no ways mixed it up with the other moneys, 339] and only drew \*the interest from time to time; Louisa retaining possession of the pass-book John Bridle had received from the bank when he paid such money in as aforesaid.

11. The petition was served upon Abbott, Gale, and Nicholas, and upon the appellants Elizabeth Samways, M. A. Strickland, J. B. Brown, H. J. Samways, F. Vincent, and George Samways and Lot Bridle Samways.

12. The appellants and Lot Bridle Samways are the persons who are entitled to the residuary estate of the testator.

13. The petition came on to be heard on the 22d of February, 1879, and the hearing was adjourned to the 22d of March, 1879, when the judge ordered that the costs of all parties should be taxed and paid out of the £200, and that the residue should be paid to the petitioner.

14. At the hearing of the petition the appellants objected that the evidence referred to in par. 9 of the case was inadmissible for the purpose of showing what was the intention of the testator with reference to the £200. The objection was overruled, and the evidence was admitted.

15. The appellants also contended that the gift of the mortgage of £200 contained in the will was a specific gift, and had been adeemed by the payment off of the mortgage in the testator's lifetime.

16. The petitioner contended that the evidence was admissible, and that no evidence of any kind had been given on the part of the appellants, and that the facts were not in dispute; that the gift was not specific, and that there had been no ademption; and that, in any event, as the mortgage-money of £200 had been so set aside by John Bridle for the benefit of the petitioner, and had not been mixed up with his other moneys, the petitioner was entitled to the £200.

The question for the opinion of the court was, whether the petitioner was entitled to the £200, or whether the same formed part of the testator's residuary estate.

*Bethell*, for the appellant: This gift of £200 is a specific gift, which has been adeemed, and the respondent is not entitled to a sum of £200 to be paid out of the estate of the testator. The \*evidence set out in the case clearly was inadmissible, and, if admitted, really amounts to nothing: see the 5th proposition in *Wigram on Wills*, 4th ed., 65.

*John Cutler*, contra: The cases of *Clark v. Browne* (\*), *Lee v. Lee* (\*), *Moore v. Moore* (\*), and *Morgan v. Thomas* (\*),

(\*) 2 Sm. & G., 524.

(\*) 27 L. J. (Ch.), 824.

(\*) 29 Beav., 496.

(\*) 6 Ch. D., 176; 22 Eng. Rep., 752.

establish that where a testator devises a specific debt due to him, if the debt is received by him during his lifetime, there is an ademption; but that if, having received it, he sets it apart and does not treat it as part of his funds, there is no ademption. The principle is correctly stated by Stuart, V.C., in *Clark v. Browne* (1): "There is no doubt on the doctrine of ademption, that, if the legacy be a specific debt, and if, after making the will, the testator receives the amount so as to extinguish the debt, there is nothing upon which the words of the gift can operate." According to these authorities, there has been no ademption here. The strongest case against the petitioner is *Gardner v. Hatton* (2); but there was no evidence there of a setting aside of the subject-matter of the bequest, as there is here. The testator receives the £200, pays it in to his bankers, not to his general account, but to a separate account, and he hands over the pass-book, with that sum entered in it to his credit, to the legatee.

*Bethell*, in reply: This is a specific gift, not of a sum of £200, but of a mortgage debt of £200 which had ceased to exist at the time of the testator's death; and there is no such evidence of a setting apart of the money as to take the case out of the ordinary rule.

DENMAN, J.: The testator by his will bequeathed to the petitioner "the mortgage debt of £200 which he had secured to him on a mortgage of premises in King Street, Melcombe Regis, belonging to William Hardy." It is impossible to read those words without seeing that the obvious intention of the testator was to give her the mortgage itself. Has there, then, been an ademption? That depends upon the rule stated by Lord Hardwicke, C., in *Humphreys* [341 v. *Humphreys* (3)], where he said that "the only rule to be adhered to was, to see whether the subject of the specific bequest remained in specie at the time of the testator's death, for, if it did not, then there must be an end of the bequest; and that the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." In all the cases relied on by Mr. Cutler, the language of the will was general, and no one of them conflicts with the rule there laid down, that, in the case of a specific bequest of a thing which has ceased to exist during the lifetime of the testator, the legacy is adeemed.

(1) 2 Sm. & G., at p. 528.

(2) 2 Cox's C. C., 184.

(3) 6 Sim., 98.

LINDLEY, J.: I am of the same opinion. The first question here is what was bequeathed to Louisa Bridle. It is a bequest of a mortgage,—a specific legacy. The only other question is, where is it? It is not to be found; and there is an end of it. In all the cases relied on by Mr. Cutler there was a bequest of something which at the death of the testator could be found. This doctrine is as old as the case of *Ashburner v. Macquire* <sup>(1)</sup>, where Lord Thurlow, C., says: "As to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognized by Lord Talbot and Lord Hardwicke. It is that, where a debt is bequeathed, and is afterwards extinguished by the act or concurrence of the testator, as by demand or suit, the legacy is adeemed; but, if paid in without suit or demand, there is no intention to adeem: and there are innumerable authorities that a legacy of a debt is not adeemed by a voluntary payment. Lord Camden, in *Attorney-General v. Parkyn* <sup>(2)</sup>, expressly exploded this distinction: so did Lord Macclesfield. I am inclined to adopt their opinions, because I can find no ground for the distinction but a passage in Swinburne, § 20, p. 7 <sup>(3)</sup>. But I doubt if the authors cited by him support him. Godolphin <sup>(4)</sup>, referring to the same books, states the rule differently; and so have other writers. By the civil law it was competent for a man, 342] after he had changed \*the subject-matter of a specific legacy, to declare by his conduct that such a change was an ademption. The case put is of a gold chain which the testator, after having bequeathed it by his will, converts into a cup: the legacy is not adeemed, because the cup might be restored to its former shape. This has not been adopted by our law. There is no ground to say that, after a legacy is extinguished, a man by his conduct may revive it. It is contrary to common sense; as appears by the instance put. The gold chain may have been given as a legacy because it had been long in the testator's family. If it be afterwards converted into a gold cup, the reason for giving it ceased." And see the judgment of Lord Thurlow in *Stanley v. Potter* <sup>(5)</sup>, where it was held that a bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally. For these reasons, I am of opinion that the peti-

<sup>(1)</sup> 2 Bro. C. C., 108.

<sup>(2)</sup> Amb., 566.

<sup>(3)</sup> 6th ed., p. 548.

<sup>(4)</sup> Orphan's Leg., 4th ed., p. 434.

<sup>(5)</sup> 2 Cox's C. C., 180.

tioner is not entitled to the £200, and the judgment of the county court judge must be reversed, with costs.

*Judgment reversed.*

Solicitor for petitioner: *G. W. Barnard*, for T. A. Harris, Weymouth.

Solicitors for respondent: *Coombe & Wainwright*, for R. N. Howard Weymouth.

[4 Common Pleas Division, 343.]

June 25, 1879.

**\*THE GUARDIANS OF THE POOR OF THE NOTTING- [343  
HAM UNION, *Appellants*; TOMKINSON, *Respondent*.**

*Evidence—Proceedings against Husband for maintenance of Child—Paternity of Child born in Wedlock—Evidence of Husband to prove Non-access—Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3.*

Proceedings by guardians of the poor before justices against a husband, to compel him to maintain a child which, although born of his wife in wedlock, he refuses to maintain on the ground that he is not its father, are not "proceedings instituted in consequence of adultery," within the meaning of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, so as to make his evidence admissible to prove non-access to his wife, and thereby bastardize the child.

CASE stated by justices under 20 & 21 Vict. c. 43.

The respondent appeared before the justices in petty sessions to answer a complaint made by the guardians of the Nottingham Union, the appellants, under 43 Eliz. c. 2, s. 6, and 31 & 32 Vict. c. 122, s. 36, and to show cause why an order should not be made upon him to maintain his child Ernest, born of his wife Mary, and who was then chargeable to the appellants' union.

The respondent was married to his wife Mary on the 10th of March, 1863, and she had five children born after such marriage. The first four children, it was admitted, were their legitimate children, but the respondent denied that the fifth child Ernest, born on the 6th of October, 1873, was his lawful child. Up to October, 1872, the respondent and his wife had lived together, but at that time he ceased to live continually with her. She was then living at No. 1 Paradise Road, Lambeth, and the respondent was living at Conduit Street, Regent Street, at a distance of about four miles apart.

Evidence was given by Elizabeth Hankey that the respondent, in December, 1872, and January, 1873, had a key of No. 1 Paradise Road, where his wife was then living, and was seen on several occasions to open the door with such

key and go into the house, on some occasions as late as one o'clock in the morning, and a particular occasion in December, 1872, was mentioned by Elizabeth Hankey, when she saw the respondent go into this house as late as one o'clock in the morning. The respondent was tenant of No. 1 Paradise Road, and maintained his wife and children there.

344] \*The respondent's wife was called on behalf of the appellants, and she proved that the child Ernest was her husband's lawful child; and that the respondent cohabited with her in November and December, 1872, and also in January, 1873. Evidence was also given by two other witnesses to corroborate her testimony.

Proof was given on the part of the respondent that in November, 1878, he had obtained a decree *nisi* for a dissolution of marriage with his wife, on the ground of her adultery with a man of the name of Martin, and the transcript of the shorthand writer's notes was given in evidence to show that the decree *nisi* was based upon evidence which was tendered in the Divorce Court to prove that the adultery was committed on or about the 26th of December, 1872, but no evidence was given other than the production of the shorthand writer's notes to prove that fact, or to prove that she had at any time committed adultery.

The respondent was called, and swore that he had never had intercourse with his wife after the 20th of October, 1872, but he admitted that he slept in the same house as his wife (but not with her) at Whitsuntide, 1873, and that he was tenant of the house where his wife lived, at No. 1 Paradise Road, and paid the rent and supported her and the child in question and his other children there, until about the middle of November, 1873.

No other evidence was given to prove that the respondent did not have access to his wife at a time when the child may have been begotten, except the evidence of the respondent himself and his sister Mary Thorkell, who swore that after October, 1872, with the exception of going to Calais to take his child to school, the respondent never was out of their house at night later than eleven o'clock from October, 1872, to July, 1874.

It was contended on behalf of the appellants, that the child being born in wedlock must be taken to be the legitimate child of the respondent, that the decree *nisi* and the shorthand writer's notes of the proceedings of the Divorce Court were not evidence to prove the adultery of the wife in December, 1872 (although it was arranged that such notes should be admitted as evidence of adultery and separation



of the respondent and his wife to save any order being sought by the guardians against the respondent for maintenance of his wife), and that even if the adultery at that \*date [345 was proved, it did not follow that the child was not the lawful child of the respondent.

It was objected on behalf of the appellants that the respondent was not entitled to be examined on his own behalf, and that, if he was a competent witness, he was not entitled to prove that he had not had access to his wife, and thereby to prove that the child Ernest was not his lawful child.

The justices overruled these objections, and decided that although there was no evidence to prove that the respondent was not the father of the child, except the evidence aforesaid, they were entitled to take into consideration such evidence to prove that he was not the father of the child. They further decided that the evidence as given in the divorce suit proved that she had committed adultery in December, 1872, and that, even rejecting the respondent's evidence, there was evidence that they might take into consideration to prove that the child was not the respondent's child. They accordingly declined to make any order.

The question for the opinion of the court was whether the justices were right in admitting the evidence objected to by the appellants, and whether there was evidence upon which the justices were entitled to find that the respondent was not the father of the child.

*Wills*, Q.C. (*Poland*, with him), for the appellants: First, it is well established law that the husband's evidence is not admissible to prove non-access to his wife, and so to bastardize his child. But a doubt has arisen on the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, which enacts that "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding." Two cases in the Chancery Division have raised the doubt. *In re Rideout's Trusts* (\*) a petition by a widower for payment of certain moneys out of court, was opposed by one of the children of his marriage who was interested in the reversion. The evidence of the petitioner to bastardize his child seems to have been admitted by James, V.C. The Vice-Chancellor did not, however, act wholly upon it, but said, "I am afraid you must give \*me some other evidence." In *In re Yearwood's Trusts* (°); the evidence of a husband to prove the illegitimacy of children born of his wife in wedlock was ad-

(°) Law Rep., 10 Eq., 41; 39 L. J. (Ch.), 192. (\*) 5 Ch. D., 545; 22 Eng. R., 283.  
30 ENG. REP.

1879

Guardians of Nottingham v. Tomkinson.

mitted by Hall, V.C., on the authority of *In re Rideout's Trusts* <sup>(1)</sup>, the Vice-Chancellor considering that James, V.C., treated such evidence as admissible, but not to be acted upon unless corroborated. The court will not consider these cases as any positive authority in favor of the reception of the evidence.

*Reginald Brown*, for the respondent: The question is whether there was any evidence on which the justices could find that the respondent was not the father of the child. Putting aside that given by the respondent, the evidence of non-access given by Mary Thorkell and the fact of the adultery at the period when the child must have been begotten were enough. The presumption of legitimacy is rebuttable, and was rebutted. Secondly. The evidence of the respondent was admissible. There are, no doubt, reasons of decency which may be urged against the admissibility of the husband's evidence of non-intercourse when he is cohabiting with his wife, but here they were not living together. 14 & 15 Vict. c. 99, enabled the parties to a suit to give evidence, and 16 & 17 Vict. c. 83, made husbands and wives of parties competent to do so, except in criminal proceedings or any proceeding "instituted in consequence of adultery." Then 32 & 33 Vict. c. 68, s. 3, removed the disability as to proceedings instituted in consequence of adultery. But, even without this act, the evidence was admissible, for the wife was no party to the proceedings, which were between the poor law officials and her husband.

[*Wills*, Q.C., admitted that the husband's evidence would have been admissible, except to bastardize his issue.]

In Taylor on Evidence, 7th ed., § 950, it seems to be suggested that the rule excluding the testimony of parents when the legitimacy of a child of their marriage is in question, to prove that they have or have not had connection, has been "indirectly superseded partly by s. 3 of the act of 32 & 33 Vict. c. 68, and partly by two modern decisions," viz., *In re Rideout's Trusts* <sup>(1)</sup> and *In re Yearwood's Trusts* <sup>(2)</sup>.

347] \*These proceedings were "instituted in consequence of adultery," as, but for the adultery, the husband would not have refused to maintain the child. When the phrase was first used in 14 & 15 Vict. c. 99, s. 4, there was no divorce court, and therefore the exception of proceedings in consequence of adultery was not meant to apply to it, but rather to chancery suits raising questions of legitimacy. And, therefore, the operation of 32 & 33 Vict. c. 68, s. 3, was probably not intended to be restricted to proceedings in the

<sup>(1)</sup> Law Rep., 10 Eq., 41; 39 L. J. (Ch.), 192. <sup>(2)</sup> 5 Ch. D., 545; 22 Eng. R., 283

Divorce Court. If it had been, the Legislature would surely have expressly said so.

There can be no doubt that James, V.C., in the case cited, admitted the evidence of the husband; whereas, if the contention for the appellants be right, the evidence was absolutely inadmissible. In *In re Yearwood's Trusts* (') the whole question was before Hall, V.C., who expressly decided it in favor of the admissibility of the evidence.

*A. Wills*, Q.C., in reply, referred to *Goodright d. Stevens v. Moss* (\*).

GROVE, J.: I think the case turns on the question really intended to be raised for our decision, viz., whether the evidence of the respondent was admissible or not. It has been contended that the question put to us is, whether on the whole evidence received by the magistrates there was sufficient to reasonably satisfy their minds of the fact of non-access, that is to say, non-intercourse between the husband and wife. But I do not think that was the question meant to be submitted to the court, for it would have been one of fact merely. We ought to look at the whole case to ascertain the substantial point raised in it. Putting the husband's testimony aside there was strong evidence that he visited the wife's house on several occasions, entering it sometimes as late as one o'clock in the morning at a time when the child might have been begotten. To rebut that evidence testimony was given by his sister, who swore "that after October, 1872, with the exception of going to Calais to take his child to school, the respondent never was out of their house at night later than eleven o'clock from October, 1872, to July, 1874." It is singular \*that this woman with [348 whom the respondent lodged should undertake to say that for a year and nine months he never was out of their house after eleven o'clock at night. How she could know this I fail to understand. Moreover, she does not say he never was absent from the house in the daytime. He might have spent all day with his wife and returned to his lodgings at eleven at night. So far there was no evidence to prove non-access. The only other evidence is the report of the proceedings in the Divorce Court, notes of which were put in to prove the adultery of the wife in December, 1872, about the time when the child was probably conceived. This evidence was objected to. It was contended that the shorthand writer's notes of the divorce proceedings were not evidence. But it was arranged that the shorthand notes, although not evidence, should be admitted without objec-

(') 5 Ch. D., 545; 22 Eng. R., 283; 39 L. J. (Ch.), 192. (\*) Cowp., 591.

tion merely to prove the fact of the divorce for adultery, but not as evidence of the date of the adultery. I think those notes were certainly inadmissible to prove the adultery of the wife.

The justices overruled these objections, and decided that, although there was no evidence to prove that the respondent was not the father of the child except the evidence aforesaid, they were entitled to take it into consideration to prove that he was not the father of the child.

Therefore the mere evidence on which they proceeded was the evidence of the husband, and the only other legal evidence was that of Mary Thorkell, the sister, which was worth nothing to prove non-access. So the real question in the case is, was the evidence of the husband admissible? It has been repeatedly decided, either positively, or negatively by such evidence never having been tendered, that, previously to the Evidence Acts rendering the evidence of husband and wife admissible in certain cases, their evidence was not admissible at common law, and Mr. Wills cited *Goodright v. Moss* (') which shows that where the legitimacy of a child is the question in dispute, the testimony of the parents, that they have or have not had connection is inadmissible. A decision was scarcely needed to show that such was the case at common law. But it is said that the evidence of the respondent was admissible by virtue 349] of 32 & 33 Vict. c. 68, which \*enacts by sect. 3, that "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties shall be competent to give evidence in such proceeding." The question is, was this proceeding before the magistrates "instituted in consequence of adultery?" I think the words of that section apply to the proceedings formerly instituted in the House of Lords, and subsequently in the Divorce Court, in consequence of adultery. Two cases have been cited in which James, V.C., is supposed to have decided that the husband's evidence was admissible notwithstanding the statute, and the report in the Law Reports gives some color to the supposition. From that report it seems as if the Vice-Chancellor had received the evidence but had not been satisfied with it alone, although without expressing a positive opinion whether it was admissible or not, and had wished for corroborative evidence, which was obtained. But the report in the *Law Journal* gives a different color to the case, and the marginal note expresses, at least, the opinion of the reporter that the learned judge really thought

(') Cowp., 591.

the evidence inadmissible, although he may not have expressly said so. We have arrived at the same conclusion. No doubt the Vice-Chancellor does not in terms say the case before him was not "a proceeding instituted in consequence of adultery," but the tendency of the case was in the opposite direction to that supposed by Hall, V.C.: *In re Yearwood's Trusts* (<sup>1</sup>). My opinion is that the words "proceeding instituted in consequence of adultery" apply to proceedings which are really instituted to produce the result of divorce as a consequence of adultery—there may be possibly other proceedings to which the words apply—but that they do not apply to such proceedings as those in the present case, which are not instituted in consequence of adultery and to bastardize, but to legitimize the child. I am of opinion that the judgment of James, V.C., is not a judgment opposed to our present decision. Even if it were so, it would not bind us, but, had it been an explicit and direct authority, we should of course hesitate before acting contrary to it. Although not absolutely a decision in terms, yet it seems to support our present judgment which is in favor of the appellant.

LOPES, J.: Two points are raised for our consideration. First, \*was the evidence of the husband admissible to [350 prove non-access? Secondly, assuming that evidence to be inadmissible, was there other evidence in the case on which the magistrates were justified in acting. With respect to the first point. The law upon it before the Evidence Acts was beyond doubt, and is well stated in the head-note, which is quite borne out by the decision, in the case of *Rex v. The Inhabitants of Sourton* (<sup>2</sup>), that "neither husband nor wife can be examined for the purpose of proving non-access during marriage." The first Evidence Amendment Act is 14 & 15 Vict. c. 99, which by s. 2 entitled the plaintiff and defendant in actions at law to give evidence. But there was this exception contained in s. 4 that nothing in the act contained should apply to any action or proceeding "instituted in consequence of adultery." It could not therefore be contended that the old law expressed in the case I have just cited was altered. Then came 16 & 17 Vict. c. 83, the effect of which was to do what the former act was held not to have done, viz., to make husbands and wives of the parties to actions competent and compellable witnesses. But there, again, was the exception as to any proceeding "instituted in consequence of adultery:" s. 2. So, still, the law on this subject was unaltered. Then came the Evidence Further

(<sup>1</sup>) 5 Ch. D., 545; 22 Eng. R., 283.

(<sup>2</sup>) 5 Ad. & E., 180.

1879

Guardians of Nottingham v. Tomkinson.

Amendment Act, 1869 (32 & 33 Vict. c. 68), on which reliance is placed by the respondent. I understand the object of that act was to make husband and wife in suits in the Divorce Court competent and compellable witnesses, and also to make the plaintiff and defendant competent and compellable witnesses in actions for breach of promise of marriage. Sect. 3 provides that "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding;" and it is to be borne in mind that this act repeals the exception in 14 & 15 Vict. c. 99 and 16 & 17 Vict. c. 83 as to proceedings instituted in consequence of adultery.

The question is, whether the proceeding in the present case was "instituted in consequence of adultery?" The proceeding was this: an application was made to justices by the parish authorities to compel the husband to maintain a child born in lawful wedlock. I think that cannot be in any way said to be a proceeding instituted in consequence [351] of adultery, and, but for the words of the act, I should have thought it too clear for argument. It appears, however, that the present point has been raised in two cases in chancery: *In re Rideout's Trusts* (1) and *In re Yearwood's Trusts* (2). No doubt *Rideout's Case* (1) at first seems in point, but when more closely examined I think that, even from the report in the Law Reports, the decision cannot be deemed any authority for saying that the old law as to the inadmissibility of the evidence of the husband or wife to prove non-access is altered, and, indeed, James, V.C., used these words: "I do not like to say that the effect of statute is to supersede the old rule." I think the true view of that case is that the Vice-Chancellor was disinclined to decide the point, because he thought it unnecessary to do so, as other evidence was brought before him sufficient for him to act upon; and as to *In re Yearwood's Trusts* (2) the decision seems to entirely proceed on the presumed authority of *Rideout's Trusts* (1). I do not think that either of those cases decide the point. If there had been any direct authority in chancery I should have been very unwilling not to follow it, and should probably have done so, and have left the Court of Appeal to determine the question.

I think the husband's evidence was not admissible to prove non-access. But then suppose it was inadmissible, was there any other evidence on which the magistrates would

(1) Law Rep., 10 Eq., 41; 39 L. J. (Ch.), 192.

(2) 5 Ch. D., 545; 22 Eng. Rep., 283.

be justified in acting? I think not, for the only other evidence was that of Mary Thorkell, and I quite agree with my Brother Grove that it is a bold assertion for any witness to make as to so long a period of time that the respondent was never out of her house at night later than eleven o'clock. But, although her evidence seems to show he was not out later, it does not prove, nor does she attempt to show that at other periods of the day he might not have visited his wife, as he may have done, having a key to her dwelling.

*Case remitted to justices.*

Solicitors for appellants: *Taylor, Hoare & Taylor*, for J. Black.

Solicitors for respondent: *Cross, Son & Riley*.

See *ante*, p. 562 note.

[4 Common Pleas Division, 352.]

June 11, 1879.

[IN THE COURT OF APPEAL.]

**\*BELMONTE and Others v. AYNARD and Another. [352**

**PAUL GÜTSCHOW and FORD (Trustee), Claimants.**

*Practice—Security for Costs—Interpleader Issue—Plaintiff residing Abroad—Nominal Defendant, really Plaintiff.*

Where one of the defendants in an interpleader issue is really interested in the result thereof as a plaintiff, he is not entitled to call upon the plaintiff in the issue to give security for costs upon the ground that the latter is a foreigner residing abroad.

Decision of the Common Pleas Division, *ante*, p. 503, affirmed.

**APPEAL** of Ford from a decision of Denman and Lindley, JJ., refusing a motion for security for costs.

The facts are fully stated in the report of the proceedings before the Common Pleas Division (<sup>1</sup>), and it is necessary here only to give the following brief statement of them. An action had been brought in the Mayor's Court, London, in which Ford was plaintiff; this action was afterwards stayed by an order directing an interpleader issue to be tried, in which Belmonte and others, trustees of F. Gütschow, were plaintiffs, and Paul Gütschow, of Japan, and Ford were defendants; but the question as to the validity of Ford's claim could not arise, unless a question between Belmonte and his co-trustees upon the one side and Paul Gütschow upon the other should have been first decided in favor of the former. Belmonte and his co-trustees resided at Hamburg, Ford in London.

*Ante*, p. 503.

1879

Belmonte v. Aynard.

*Lamaison*, for Ford: This case falls within the general rule that where a plaintiff is a foreigner residing abroad he is bound to give security for costs; as a matter of convenience and in order to determine the rights of all the parties in one proceeding, Ford has been made a party to the issue; as he is a defendant, he is entitled to all the protection afforded by the practice of the court to defendants, who are sued by foreigners residing abroad.

*R. V. Williams*, for Belmonte and others: In this interpleader issue Ford is really a plaintiff; and one plaintiff cannot call upon another plaintiff to give security for costs.

353] \*BRAMWELL, L.J.: I think that the decision of the Common Pleas Division must be affirmed. Ford in this dispute occupies the position of a plaintiff; if the suit in the Mayor's Court had proceeded, he would have been the plaintiff in it. I incline to think that Ford ought not to have been made a party to the interpleader issue. The Common Pleas Division was right in holding that he was not entitled to security for costs.

BRETT, L.J.: The only ground for the application before us is that the plaintiffs in the interpleader issue reside abroad, and that Ford has been made a defendant to it; but he is only nominally a defendant; he is really a plaintiff. The first question to be tried will be between Belmonte and his co-trustees upon the one side, and Paul Gütschow, of Japan, upon the other; if Paul Gütschow succeeds, Ford will have no claim; if, however, the first question is decided in favor of Belmonte and his co-trustees, then a second question will arise between them and Ford; but during the trial of the first question Ford's part will be only passive.

COTTON, L.J.: This is an application that the plaintiffs in an interpleader issue be ordered to give security for costs, on the ground that they are foreigners residing abroad. I think that the Common Pleas Division was right in refusing to make an order. The applicant, Ford, is nominally a defendant, but he is really a plaintiff. There are really two issues; in the first Ford has no interest except in common with Belmonte and his co-trustees; but if the issue is decided against Gütschow, of Japan, then the question will arise in which Ford is immediately concerned. It is unnecessary to say whether the form of the issue in the present case is convenient.

*Appeal dismissed.*

Solicitors for plaintiffs: *Ashurst, Morris & Co.*

Solicitors for Ford: *Saunders, Hawksford & Bennett.*



[4 Common Pleas Division, 354.]

March 22, 1879.

[IN THE COURT OF APPEAL.]

\*BUTTON v. O'NEILL.

[354]

*Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1—Affidavit—Description of Residence of Maker—Change of Residence by Maker between Execution and Registration of Bill of Sale.*

The "description of the residence" of the maker of a bill of sale, required by the Bills of Sale Act, 1854, s. 1, to be stated in the affidavit filed therewith, must be his residence at the time of swearing the affidavit and not of executing the bill of sale.

*London and Westminster Loan and Discount Co. v. Chace* (12 C. B. (N.S.), 730; 31 L. J. (C.P.), 314) disapproved of.

[4 Common Pleas Division, 359.]

March 15, 1879.

[IN THE COURT OF APPEAL.]

\*SHAW and Others v. THE EARL OF JERSEY. [359]

*Practice—Procedure—Injunction—Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 8—Landlord and Tenant—Restraining distress, Terms of—Payment of Rent into Court.*

An injunction, to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms and conditions as the court shall think just," under the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 8.

The terms and conditions which the court thought just and imposed on tenants, who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only if the rent was in the meantime paid into court.

Decision of the Common Pleas Division, *ante*, p. 120, affirmed.

[4 Common Pleas Division, 362.]

June 19, 1879.

\*DE GREUCHY v. WILLS and WIFE. [362]

*Husband and Wife—Lex loci contractus—Conflict of Laws—Liability of Husband married in England for ante-nuptial Debts contracted by Wife in Jersey—Married Women's Property Act, 1870, Amended Act, 1874 (37 & 38 Vict. c. 50), s. 2.*

By the law of Jersey a husband is liable for the ante-nuptial debts of his wife, and the Married Women's Property Act, 1870, Amendment Act, 1874 (37 & 38 Vict. c. 50), does not apply to Jersey:

*Held*, notwithstanding, that an Englishman married in England, after the passing of the act, to a woman who has contracted debts while a *feme sole* in Jersey, is liable, in an action brought against them in England for those debts, to the extent only of the assets derived from his wife and specified in s. 5 of the act,

1879

Hartley v. Hudson.

[4 Common Pleas Division, 367.]

March 29, 1879.

367]

\*HARTLEY V. HUDSON.

*Local Government Acts—Public Health Acts, 1848, 1858, and 1875—Sewering and Paving—Landlord and Tenant—Covenant to pay Rates, Taxes, and Charges.*

The defendant became tenant of a house under a lease by which he covenanted to pay "all rates, taxes, charges, and assessments whatsoever which now are or may be charged or assessed upon the said premises, or any part thereof, or upon any person or persons in respect thereof," land tax and property tax excepted. The local board of health gave notice to the plaintiff, as owner (he having acquired the lessor's interest in the premises), to sewer, level, pave, &c., the street in which the house was situate; and, upon his failure to comply with the notice, the board did the work, and made an apportionment upon him in respect thereof, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the acts amending that act, and he was compelled to pay the amount and interest:

*Held*, that this was a "charge upon the premises," or "upon a person in respect thereof," from which by his covenant the defendant undertook to relieve the plaintiff, and therefore the plaintiff was entitled to maintain an action against the defendant in respect of the money and interest so paid by him.

FURTHER CONSIDERATION. The cause was tried at the last assizes at Manchester.

*C. Russell, Q.C.*, and *S. Taylor*, appeared for the plaintiff.  
*Ambrose, Q.C.*, and *Edge*, for the defendant.

The facts are fully stated in the judgment, which was delivered by

LINDLEY, J.: I am of opinion that the plaintiff is entitled to judgment.

On the 16th of August, 1867, the defendant became tenant of a public house within the borough of Stockport under a lease by which he was to pay to the lessors the yearly rent of £40, "free from all present and future parliamentary, parochial, and other taxes, rates, charges, deductions, and impositions whatsoever (the land tax and property tax, if any, only excepted)." The lease also contained a covenant by which the defendant undertook to pay "all rates, taxes, charges, and assessments whatsoever which now are or may be charged or assessed upon the said premises or any part thereof, or upon any person or persons in respect thereof (except as aforesaid)."

Prior to the year 1874, a street was made by certain persons unconnected with the plaintiff or defendant, but adjoining the \*demised premises; and such street as found by the jury, was prior to 1874 existing as a street. In April, 1874, the corporation of Stockport, as local board of health, gave notice under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69, to the plaintiff (who had acquired the lessor's

interest in the premises), as owner, that he was required to sewer, level, pave, &c., this street. The plaintiff did not comply with the requirement of this notice, and subsequently the required works were done by the corporation; and the proportion of the expenses in respect of these premises was settled by the surveyor of the corporation.

The notice above mentioned was clearly given under the Public Health Act, 1848: it may be doubtful whether the work actually was done under that act or under the Public Health Act, 1875 (38 & 39 Vict. c. 55), which came into force on the 11th of August, 1875; but, as the provisions of the latter act (ss. 150 and 257) are, so far as regards this case, identical with those of the former act and of the Local Government Act, 1858, and as in argument the acts of 1848 and 1858 were assumed to apply, I shall consider the case as under the act of 1848 and the acts amending the same.

The question here is upon the construction of the covenants in the lease. The expense of paving, &c., can scarcely be said to be a rate, tax, or assessment; and hence it only remains to consider whether it was a *charge* "charged or assessed upon the said demised premises, or upon any person or persons in respect thereof."

There is a distinction to be drawn between a charge upon premises and a charge upon a person, as the former would be binding upon the realty, whilst the latter would be a mere personal liability for expenses incurred in respect of the premises; but in this case it may be said that there was a charge upon the premises and a charge upon a person, viz., upon the plaintiff as owner of the premises. By the Public Health Act, 1848, such expenses are to be paid by the owner in default, in such proportion as shall be settled by the surveyor, and such expenses may be recovered from the owner in a summary manner, or the same may be by order of the local board declared private improvement expenses, and be recoverable as in the act provided. There was \*no evidence produced to show that these expenses [369 had been declared private improvement expenses; they were demanded from the plaintiff, and he paid them with interest due under the provisions of the act to which I shall now call attention.

By the Local Government Act, 1858, which made corporations the local boards of health in boroughs, it was provided (s. 62), that, "where the local board has incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by

the Public Health Act, 1848, or any act incorporated therewith, or this act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848; and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of £5 per cent. per annum till payment thereof." Now, these expenses paid by the plaintiff were incurred in respect of the demised premises, and by the terms of the above section were a charge upon the premises until payment. The fact of the plaintiff paying them because he was compellable by law to do so, does not make them any the less a charge on the premises within the meaning of the covenant in the lease; and hence I am of opinion that the plaintiff is on this ground entitled to recover.

But I think the plaintiff is also entitled to recover because these expenses were a charge upon "a person in respect of the premises," i.e., they were a debt payable by the plaintiff in respect thereof. The plaintiff, by the Public Health Act, 1848, had a duty cast upon him to pave, &c., and he neglected to perform that duty, and in consequence this expense was incurred by the corporation: this expense, then, became chargeable by the corporation to the plaintiff, and it was so chargeable in respect of these premises. In *Tidswell v. Whitworth* (<sup>1</sup>), it was held that, where the act imposed upon the landlord the duty of performing the work, it could not be said that, upon the corporation charging the landlord with the expenses, these expenses could be called "taxes, rates, assessments, or impositions payable in respect of the 370] \*premises;" but that such expenses were payable in respect of the owner's default to do the work. But the covenant in the lease in that case did not contain the words "charged upon any person or persons in respect thereof;" and in subsequent cases these words are shown to be important. *Thompson v. Lapworth* (<sup>2</sup>), although distinguished from *Tidswell v. Whitworth* (<sup>1</sup>) on the ground that there was no duty on the part of the landlord to do the work, was also distinguished on the ground that the covenant there contained words by which the tenant undertook to pay "all taxes, &c., which should be taxed, &c., on the tenant or landlord of the premises;" and this distinction is pointed out in *Rawlins v. Briggs* (<sup>3</sup>). In *Crosse v. Raw* (<sup>4</sup>), the tenant had covenanted to pay all "outgoings which should

(<sup>1</sup>) Law Rep., 2 C. P., 326.

(<sup>2</sup>) Law Rep., 3 C. P., 149.

(<sup>3</sup>) 3 C. P. D., 368; *ante*, p. 231.

(<sup>4</sup>) Law Rep., 9 Ex., 209; 10 Eng. R., 386

at any time during the said demise be taxed, rated, charged, assessed, or imposed upon the said demised premises or *upon the landlord or tenant* in respect thereof." Now, there, the local board had the right to compel the owner to make a drain connecting with the main sewer, or, in default, to do it themselves. Bramwell, B., there says: "It is said it was the duty of the defendant (the landlord) to make the drain, and that, if he had done so, the expense would not have been an outgoing "taxed, rated, charged, assessed, or imposed" upon or in respect of the premises. Now, the point so stated seems to be scarcely arguable; for, the argument in substance is, that, if the local board had a right to make the drain in the first instance, and charge the expense on the defendant, it would be an outgoing imposed on the landlord in respect of the premises; but, if they had a right to compel the defendant to do it, and he did it, it would not be an outgoing imposed on him in respect of the premises. This seems preposterous. It would certainly be something which had gone out, an expense which he had been at in respect of the premises; and it would have been an expense imposed on him."

In this case, whether the plaintiff had done the work himself or paid the expense of its being done by the corporation, he would have done either by compulsion, and the cost of so doing would have been a charge charged upon him in respect of the premises. \*Hence, I am of opinion that [371 there must be judgment for the plaintiff, for £68 17s. 3d., and £2 11s. for interest.

*Judgment accordingly.*

Solicitors for plaintiff: *Hughes & Son*, for A. F. Vaughan, Heaton Norris, and Stockport.

Solicitors for defendant: *Norris, Allens & Carter*, for Diggles & Ogden, Manchester.

1879

Dixon v. Whitworth.

[4 Common Pleas Division, 371.]

May 12, 1879.

DIXON V. WHITWORTH.

DIXON V. THE SEA INSURANCE COMPANY.

*Insurance (Marine)—Insurable Interest—Salvage—Costs of Salvage Suit—Suing and Laboring Clause.*

The plaintiff agreed with one W. for a sum of £10,000 to transport the obelisk known as "Cleopatra's Needle" from Alexandria to London, and there to erect it upon some public site to be afterwards selected. He accordingly placed it in an iron case which he named The Cleopatra, shaped somewhat like a ship, with a small deck and a mast and steering apparatus, and engaged a steam vessel called the Olga to tow it to England. To cover the expenses (about £4,000) incurred by him in getting the obelisk afloat, and the cost and risk of the voyage to England, the plaintiff caused two policies to be effected with the respective defendants "upon the goods and merchandises in the good ship or vessel called The Cleopatra iron vessel containing the obelisk . . . . valued at £4,000 . . . . against the risk of total loss only;" the risks insured against being the ordinary sea risks, and the suing and laboring clause being in the ordinary form.

In the course of the voyage The Cleopatra got adrift in a storm in the Bay of Biscay, and the Olga after some ineffectual attempts to recover her proceeded to England without her. The Cleopatra was ultimately picked up by another steamer and carried into Ferrol, where the salvors detained her under a claim for salvage. A suit was afterwards instituted by the salvors in the Admiralty Court, London, in which they claimed £25,000 for salvage services. The court awarded them £2,000 and costs.

In actions upon the policies :

*Held*.—1. That the plaintiff, being the owner of The Cleopatra, and having possession of the obelisk, and (possibly) a lien upon it for his expenditure, had a sufficient insurable interest, at least to the extent of his outlay :

2. That the true effect of both policies was, an insurance, not on "cargo" or "freight" only, but on the vessel and her cargo :

3. That, under the suing and laboring clause, the assured was entitled to recover the £2,000 awarded to the salvors, but not the costs of the proceedings in the Admiralty Court, nor the expenses incurred by him in refitting The Cleopatra at Ferrol and towing her to London.

ACTIONS upon two policies of insurance, the terms of which and the circumstances under which they were effected are 372] sufficiently \*stated in the judgment. The causes were tried together before Lindley, J., at Westminster on the 26th of March, 1879, and were argued upon motions for judgment on the 26th of April and the 3d of May by *Bull*, Q.C., and *Gainsford Bruce*, for the plaintiff, and by *C. Russell*, Q.C., *J. C. Mathew*, and *Myburgh*, for the defendants. The following authorities were referred to :

For the plaintiff,—*Mors-le-Blanch v. Wilson* (¹); *Rolph v. Crouch* (²); *Xenos v. Fox* (³); *Dent v. Smith* (⁴); *Watson v. Marine Insurance Co.* (⁵).

(¹) Law Rep., 8 C. P., 227; 5 Eng. R., 286.

(²) Law Rep., 3 Ex., 44.

(³) Law Rep., 8 C. P., 630; 4 C. P., 665.

(⁴) Law Rep., 4 Q. B., 414.

(⁵) 7 Johns. (N.Y.), 61.

For the defendants,—*Dickinson v. Jardine* ('); *The Pyrennee* ('); Lowndes on Average, 4th ed., p. 231.

*Cur. adv. vult.*

May 12. LINDLEY, J., delivered judgment.

These are actions brought by an assured against the underwriters of two marine policies, in respect of losses occasioned by the accident which befel the celebrated Cleopatra obelisk on her voyage from Alexandria to this country.

The plaintiff is a civil engineer; and it appears from his evidence that he was desirous of seeing the obelisk brought over to England, and had a conversation with Mr. Erasmus Wilson on the subject. Ultimately, by an agreement dated the 31st of January, 1877, and made between Mr. Wilson of the one part and the plaintiff (Mr. Dixon) of the other part, it was in effect agreed that Mr. Dixon should at his own expense and risk transport the obelisk to London and erect it there uninjured, and that, in the event of his succeeding, Mr. Wilson should pay him £10,000. Mr. Dixon, however, was to incur no liability to Mr. Wilson in the event of failure in the enterprise. On the other hand, Mr. Dixon was to have no claim whatever against Mr. Wilson except in the event of success. Further, it appears from Mr. Dixon's evidence that he did not anticipate any profit to himself from the transaction: in other words, it was not expected that the £10,000 would more than cover the expenses.

The only evidence before me respecting the ownership of the \*obelisk is the plaintiff's statement that there [373 was a dispute about it, and the Khedive presented it to the British nation, and handed it to him, the plaintiff, on their behalf.

Having made the above agreement, Mr. Dixon commenced to prepare for the transport of the obelisk. He spent considerable sums of money and much labor in doing this, and he built the vessel called *The Cleopatra*. This was in fact little more than an iron case in which the obelisk was stowed and in which it would float. The vessel had no other use, and was fit for no other purpose. The vessel was quite subordinate to its cargo, and the cost of its construction was for all practical purposes nothing more than part of the cost of transporting the obelisk.

In September, 1877, the obelisk was in its case, or, in other words, was on board *The Cleopatra*, and was ready to be towed to England. On the 15th of September, an agreement was entered into between the owners of the steamship *Olga*

(') Law Rep., 3 C. P., 639.

(') Br. & L., 189.

of the one part and Mr. Dixon of the other part, for the towage of The Cleopatra with the obelisk on board from Alexandria to London, for the sum of £900.

The expenses and liabilities which Mr. Dixon had incurred up to this time in constructing the vessel, in getting the obelisk on board, in properly stowing it there, and in providing for its transport, were estimated by him at £4,000, and did in fact amount to about this sum.

On the 20th and 21st of September, 1877, the policies on which these actions were brought were effected by Messrs. Barr & Co. for Mr. Dixon. I will presently state their language and legal effect.

The Cleopatra and the obelisk left Alexandria on the 21st of September, 1877, in tow of the Olga. All went well until the 14th of October, when a severe storm was encountered in the Bay of Biscay, and the Olga was compelled to cast The Cleopatra off. On the 15th the Olga took the crew of The Cleopatra on board, and afterwards lost sight of her, and, having vainly endeavored to find her, gave up the search and came on to England without her. On the evening, however, of the same day, the steamer Fitzmaurice fell in with The Cleopatra, and, after great risk and labor, succeeded in saving her and in towing her into Ferrol. The Cleopatra and obelisk afterwards reached London in safety. 374] \*The Court of Admiralty awarded salvage to the Fitzmaurice. For the purpose of determining the amount to be awarded, the obelisk was estimated to be worth £25,000, and the sum awarded to the salvors was fixed at £2,000. This sum the plaintiff paid. He also paid the costs of the proceedings in the admiralty, and certain expenses in refitting The Cleopatra at Ferrol, and in towing her with the obelisk from that port to London. The present actions are brought to recover contribution from the underwriters in respect of these salvage and other expenses. The policies on which the actions are brought, are worded as follows:

Whitworth's policy is for £1,000 "upon the goods and merchandises in the good ship or vessel called The Cleopatra iron vessel, containing the Cleopatra obelisk." "The goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at £4,000." "Vessel and obelisk being insured against the risk of total loss only." The risks insured against are the ordinary sea risks; and the suing and laboring clause is in the ordinary form.

The Sea Insurance Company's policy is for £2,000, "upon any kind of goods and merchandises, and also upon the



body, &c., of and in the good ship or vessel called The Cleopatra iron vessel, containing the Cleopatra obelisk." "The said ship, &c.; goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and the company in this policy, are and shall be, vessel and obelisk valued at £4,000." This policy also is against total loss only. The clauses relating to the risks insured against, and the suing and laboring clause, are in the ordinary form.

The actual wording of the suing and laboring clause was in both policies as follows: "And, in case of any loss or misfortune, it shall be lawful for the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured."

Although the language of the first policy is not quite clear as regards the subject-matter insured, I think the first policy is on \*both ship and cargo, and not on cargo only. [375] The second policy is clearly on both.

The plaintiff's interest in The Cleopatra and obelisk were as follows: He was owner of The Cleopatra: he was not owner of the obelisk; but he had spent money upon it, had possession of it, and probably had a lien upon it for his expenditure. Taking The Cleopatra and obelisk together, the value of his interest in them at the date of the policies was £4,000. This was all he had at risk, and all that was worth insuring. It is true, that, in certain events, he might become entitled to £10,000 under his agreement with Mr. Wilson: but this sum was only calculated to cover expenses; and Mr. Dixon, as a prudent man, would hardly incur further expense until the risks of the voyage were over. I regard the policies as being exactly what they purport to be, viz., policies on the obelisk and the vessel it was in; and I regard Mr. Dixon as having an insurable interest in them to the extent of £4,000, and as having insured that interest by the policies. The description in the policies is sufficient in my opinion to cover that interest: *M'Kenzie v. Whitworth* (\*) shows that it is sufficient to specify the subject-matter of insurance, and that it is not necessary to describe the assured's interest in it, unless his interest is such as to affect the risk insured against; which was not the case here.

It was suggested that these policies ought to be regarded

(\*) Law Rep., 10 Ex., 142; 12 Eng. R., 582; 1 Ex. D., 36; 15 Eng. R., 286.

as analogous to policies on freight to be earned on the safe arrival of cargo; but, in my judgment, this is not the correct view: the analogy is too fanciful and far-fetched to be of any practical use. The true effect of the policies is in my opinion what I have above described.

The first question which arises, is, whether the underwriters are bound to pay anything in respect of any of the expenses to recover which the actions are brought. These expenses are,—1. The £2,000 paid for salvage,—2. The costs of the proceedings in the admiralty,—3. The expenses of refitting at Ferrol and of towing from that port to England. It will be convenient to consider each of these in turn.

1. As to the £2,000 paid for salvage: The policies are against the risk of total loss only. Neither *The Cleopatra* 376] nor the \*obelisk was totally lost: both were in fact saved; and the defendants therefore contend that they are under no liability whatever. But, although there was no total loss, it is clear beyond all doubt that *The Cleopatra* and her cargo were in imminent danger of destruction, and were saved from total loss by the services of the salvors. The underwriters, therefore, have had the benefit of these services, and are bound in my opinion to indemnify the plaintiff against his liability in respect of them. It is true that the language of the suing and laboring clause does not in terms extend to any services except those rendered by the assured, their factors, servants, and assigns: and it is also true that the salvage services in this case were not rendered by Mr. Dixon, nor by any factor, servant, or assign of his, unless the salvors are to be regarded as having been his agents by necessity or by ratification. But, without discussing how far the salvors can properly be regarded as agents, I take it to be settled that the suing and laboring clause ought to be construed to cover expenditure which the assured necessarily became liable to pay, by way of salvage in respect of preservation from loss which if it had occurred would have fallen on the underwriters: see *Lohre v. Aitchison* (\*); *Kidston v. Empire Marine Insurance Co.* (\*). In truth, Mr. Russell did not seriously contest this point, although he thought it his duty to submit it to the court for decision. The same case of *Lohre v. Aitchison* (\*) shows that this clause is operative even although there is no total loss, and nothing abandoned to the underwriters: and in my opinion they are bound by this clause to indemnify the plaintiff, in proportion to the sums they respectively insured, against his loss of the £2,000 awarded for salvage.

(\*) 3 Q. B. D., 558, 556.

(\*) Law Rep., 1 C. P., 535; 2 C. P., 357.

2. As regards the costs of the admiralty proceedings,—I am of opinion that the underwriters are not liable for these costs, or any part of them. I quite accede to the view that they were necessarily and properly incurred in ascertaining the proper amount of salvage to be paid; and I agree in the observation that, in order to enable Mr. Dixon to get the obelisk out of the hands of the salvors, it was as necessary to pay or secure their costs as to pay or secure the salvage itself. But the costs which Mr. Dixon has \*had to [377 pay are not in my opinion charges incurred by him to avert a loss insured against, or, at all events, they are too remotely so to be covered by the words of the policies before me. The suing and laboring clause is silent about costs; and no authority has been produced in which costs have been recovered under it. I do not regard *Xenos v. Fox* (\*) as conclusive against the plaintiff on this point; but it certainly is rather against him than for him: and the fact, that the suing and laboring clause did not cover such losses as are now usually provided for by the collision clause, goes far to show that the costs which I am considering cannot be thrown on the underwriters. Their contract does not cover them.

3. As regards the expense of refitting at Ferrol, and towage from that port to London, I am of opinion that these matters cannot be thrown on the underwriters. They were not incurred by Mr. Dixon to avoid a total loss by perils of the sea of the obelisk or of his interest in it. They were not incurred until after the obelisk had been saved. It is true that Mr. Dixon would have lost the benefit of his agreement with Mr. Wilson if he had not got the obelisk home. But, as has been seen, he did not insure the benefit of that agreement; and, as soon as the obelisk was saved, the interest in it which he insured by the policies was saved also. These policies are against total loss only; and any loss sustained by the plaintiff in getting the obelisk home after it was safe at Ferrol must be borne by him: see *Great Indian Peninsular Railway v. Saunders* (\*).

I pass now to the next and last question which arises, viz., whether the plaintiff is entitled to recover in respect of the whole £2,000 or only in respect of some portion of that sum, viz., in respect of what, as between himself and the other persons interested in the obelisk, would be his proper proportion, supposing the obelisk to have been uninsured.

This question depends on the true construction and effect

(\*) Law Rep., 3 C. P., 630; 4 C. P., 665.

(\*) 1 B. & S., 41; 30 L. J. (Q.B.), 218; 2 B. & S., 266; 31 L. J. (Q.B.), 206.

1879

Dixon v. Whitworth.

as analogous to policies on freight arrival of cargo; but, in my judgment: the analogy is too fanciful practical use. The true effect of the clause is to put the assured in the same position as the assured shall be

The first question which arises, if not prevented, would writers are bound to pay a sum where there are no words to the effect expenses to recover which shall be repaid such proportion of expenses are,—1. The £1000 is a suitable adjustment between him of the proceedings in all on him alone. The agreement is, refitting at Ferrol and proportion to the amount subscribed) to It will be convenient for the services. In other words, the underwriter

1. As to the £1000, each underwriter against the risk in proportion to the amount for which he [376] nor the underwriter, the early part of the clause authorizes saved; and the underwriter endeavor to save, not his interest in the thing under no loss of the thing itself; and the language of the clause total loss, but to cases in which other persons besides himself her cargo is lost in that thing. Further, it is now clearly saved that this clause is a distinct and independent under the policy, which, although occurring in and forming part vices of the policy, may entitle the assured to recover more than tiff the amount underwritten: see *Lohre v. Aitchison* (\*). Having th regard to this principle, and to the language and known ob- t of the clause, I am of opinion that, whatever services or charges of the assured fairly come within it must be paid for by the underwriters in proportion to their subscriptions. This view is in accordance with that adopted by Chancellor Kent, in *Watson v. Marine Insurance Co.* (\*); and, although that decision is controverted by Mr. Phillips, § 1742, note 5, and by Mr. Lowndes, *Law of Average*, 4th ed., p. 231, I am of opinion that Chancellor Kent's view is more in accordance with the true intent and meaning of the suing and laboring clause than are the views of his critics. They do not, I think, attach sufficient importance to the clause being a distinct agreement to pay for services rendered to avoid a loss insured against.

The underwriters will be at liberty, on paying Mr. Dixon, to enforce such rights, if any, as he may have against other persons in respect of their proper shares of the salvage expenses, see *Dickinson v. Jardine* (\*); and, although in this [379] particular case \*those rights will probably be of no avail, yet, whatever they may be worth, the underwriters will be entitled to enforce them.

(\*) 3 Q. B. D., 558.

(\*) 7 Johns. (N.Y.), 57.

(\*) Law Rep., 3 C. P., 639.

Carey v. Barrett.

1879

ment is for the plaintiff for £500  
 itworth, and for £1,000 against  
 Insurance Company, these sums  
 es of the £2,000. In each action  
 y the costs.

*Judgment accordingly.*

antiff: *Argles & Argles.*

the Sea Insurance Co.: *Rowcliff's*, for Stone  
 Liverpool.

for Whitworth: *Robinson & Hodding*, for Bate-  
 ., Liverpool.

[4 Common Pleas Division, 379.]

May 30, 1879.

### CAREY V. BARRETT.

*Debtor and Creditor—Composition Agreement, Construction of—Payment under Pressure.*

At a meeting of the defendant's creditors, the following agreement, to which the plaintiff was an assenting party, was made and signed by all the creditors present: "We the undersigned creditors of W. B., in consideration of 10s. in the pound on our respective debts set opposite to our respective names, hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said W. B.: the whole of the creditors receiving not exceeding a like sum in discharge of their debts."

At the time of entering into this agreement, it was known that the debtor was being sued in a county court by one P. as executor of a creditor for a small sum which was afterwards paid in full the day before the cause was ripe for trial:

*Held*, that the agreement was limited to the creditors signing it; and that, even if it were not so, the payment to P. being made under pressure, and not in pursuance of a prior arrangement to give him a preference, did not render the transaction void.

THIS was an action brought by the plaintiff in the Tunbridge Wells County Court against the defendant, to recover interest alleged to be due under an indenture of mortgage of the 16th of May, 1873, made between the plaintiff of the one part and the defendant of the other part, whereby, after reciting that the defendant was indebted to the plaintiff in £155 17s. 9d., certain freehold land and houses were granted to the plaintiff, subject to two prior mortgages for £1,000 and £100 respectively. The \*indenture contained a cov- [380  
 enant for payment of the principal on a given day and interest at £5 per cent. half yearly.

On the 6th of June, 1873, the defendant called a meeting of his creditors, at which meeting the plaintiff was present, when the following agreement was come to, and signed by all the creditors then present,—“We the undersigned creditors of William Barrett, of Tunbridge Wells, coal merchant and builder, in consideration of 10s. in the pound on our respective debts set opposite to our respective names, here-

1879

Carey v. Barrett.

by agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said William Barrett: the whole of the creditors receiving not exceeding a like sum in discharge of their debts."

The plaintiff signed the agreement as a creditor for £155 17s. 9d., and received the dividend £77 18s. 10d. Against his name in the list of creditors was a note or memorandum, "Security to be given up and cancelled." The mortgage deed, however, was not given up.

At this time Pink, the executor of one Powell, a creditor of Barrett for £12 11s. 6d., was suing him in the county court. Pink was no party to the composition; and on the 11th of June, which was the day before the action was set down for trial, the defendant paid this claim in full by payment into court of £12 11s. 6d., with 14s. for costs. The existence of this debt was known to the other creditors at the time of the agreement for the composition.

This action was brought to recover £17 9s. 4d. for interest due on the balance of the mortgage money, from the 16th of May, 1873, to the 16th of May, 1878. At the trial in the Tunbridge Wells County Court on the 17th of April last, the judge held that the plaintiff was not bound by the composition agreement, inasmuch as the condition,—“the whole of the creditors receiving not exceeding a like sum in discharge of their debts,”—was broken: and he accordingly gave judgment for the plaintiff for the amount claimed and costs.

An order *nisi* was on the 24th of April obtained at chambers to enter judgment for the defendant, on the ground that the judge's ruling as to the construction of the agreement was erroneous.

381] \* *Willis*, Q.C., and *E. Baldock Stone*, showed cause: The condition upon which alone the plaintiff consented to take 10s. in the pound for his debt having been broken by payment to one creditor of his debt in full, he is remitted to his original rights, and was not bound to deliver up the security to be cancelled.

[LINDLEY, J.: Do you find any case where an agreement for a composition has been held void on such a ground, in the absence of any pre-existing arrangement with one creditor that he shall receive more than the rest?]

No: but this is the ordinary stipulation in all agreements for composition. "The whole of the creditors" could not mean "all those who had consented to take 10s. in the pound;" *their* debts were satisfied.

*H. Matthews, Q.C., and English Harrison, contra:* An agreement entered into between a debtor and any number of his creditors less than the whole number, to take a composition for their debts, is binding upon those who enter into the agreement: *Norman v. Thompson* (\*). The agreement here, which is very informal, applies to the signing creditors only. If the payment in full to Powell's executor had been the result of a previous understanding that he should receive twenty shillings in the pound, the composition purporting to bind *all* the creditors, the plaintiff's contention might have been well founded. But here there is no suggestion of fraud or concealment; and the payment was not a voluntary one, but made for the purpose of avoiding unnecessary costs in an action to which there was no defence. The agreement, even if applicable to creditors who were not parties to it, is not avoided by such a payment as that. And see Chitty on Contracts, 7th ed., p. 641; Leake on Contracts, 404; *Knight v. Hunt* (\*).

LORD COLERIDGE, C.J.: I do not pretend to say that this is by any means a clear instrument; but I have come to the conclusion, though not without some doubt, that the view taken by the county court judge was wrong. It is a document whereby certain creditors of Barrett (whose claims amount in the aggregate to a considerable sum) agree to take 10s. in the pound in discharge of their debts. \*They grant [382 the debtor a release, "on the understanding that no concealment or fraud has been practised by Barrett." Then come these words, "the whole of the creditors receiving not exceeding a like sum in discharge of their debts." The real question is whether the meaning of the document is that *no* creditor is to receive more than 10s. in the pound, whether party to the arrangement or not. I agree that, if that were the true interpretation, the voluntary payment to any one of them of more than the stipulated sum would be a fair ground for impeaching the agreement. I am not aware of any distinct authority for it; but I believe that the general understanding of the profession has been that a payment in excess made afterwards will not avoid the composition, unless made in pursuance of a previous understanding. It seems to me that to construe the concluding words of the memorandum to refer only to those creditors who sign it will be giving it a sufficient sense. The creditors who are assenting parties may very well agree to relieve the debtor of half their debts, provided it be understood that no signatory shall receive a larger dividend than the rest. The

(\*) 4 Ex., 755.

(\*) 5 Bing., 432.

plaintiff seeks to impeach the transaction, because the executor of Powell who had a small claim against Barrett had sued him in the county court, and, the case being on the eve of trial, the debtor, having no defence, paid the debt. This was not the less a payment under process of law, because the debtor did not wait to incur the expense of a judgment and execution. And this for anything that appeared was known to all the signatories at the time. Is that such a payment as vitiates the agreement? If the stipulation at the end means *all* the creditors, we need not discuss it. I think fairly read it means all us signatories. It may fairly mean, no creditor shall by virtue of this agreement receive more than 10s. in the pound. Pink's demand was not satisfied under and by virtue of the agreement. I cannot think that the construction sought to be put upon the agreement by Mr. Willis is a reasonable one. It is very unlikely that such a bargain would have been made. I think the judgment must be reversed.

LINDLEY, J.: The case is certainly not free from doubt. My reason for concurring in the opinion expressed by my Lord is, that, if the signing creditors intended to make the 383] release \*conditional, they have not done it in clear and unambiguous language. This is to be considered, that we are in absolute ignorance of the state of the debtor's affairs at the time; but we know this, that there was no fraud or concealment. Assuming, then, that he had made a full disclosure, did the creditors mean that the arrangement should go for nothing if the claim of Powell's executor were not included in it? An executor can only under very exceptional circumstances justify the acceptance of a composition. I must say I was much struck with the change of language here: the document speaks in one part of "our debts," and in another of "their debts." Each alternative seems to me to be full of difficulty. But, upon the whole, I have come to the conclusion that these parties intended to release Barrett from their respective debts; and that, if they meant to make that release conditional, they have not used apt language to make it so. Upon these grounds I think the view taken by my Lord is the right one, and that the decision of the county court judge must be reversed, though, as the matter is so doubtful, I think there should be no costs.

*Judgment reversed.*

Solicitors for plaintiff: *Stone & Simpson*, Tunbridge Wells.

Solicitor for defendant: *George Burton*, Tunbridge Wells.



See 18 Eng. Rep., 321 note; 24 id., 558 note; 25 id., 258 note; 26 Am. Dec., 61 note.

A debtor who seeks a compromise with his creditors must act in good faith, and if he induce his creditors to agree to his discharge by false representations or fraudulent concealments, the agreement is void: *Elfelt v. Snow*, 2 Sawyer, 94; *Ackerman v. Ackerman*, 5 N. J. Law Jour., 179, Sup. Court, N. J.

Such debtor is responsible for the false representations or concealments of his agent, though innocently made and without his knowledge, if the debtor was aware of the state of the facts at the time: *Elfelt v. Snow*, 2 Sawyer, 94.

When a debtor represents that he will have "some means" left after paying his creditors forty-five cents on the dollar, it is not to be presumed that such expression was understood by the creditors as meaning that the debtor would have more "means," by half, than he was paying his creditors: *Elfelt v. Snow*, 2 Sawyer, 94.

In effecting a composition agreement, the law demands the utmost good faith on the part of the debtor. He cannot be permitted, by pretending to be insolvent, to induce a creditor to accept one half of a debt in lieu of the whole, when in fact his property is ample to pay his creditors in full: *Hefter v. Cohn*, 73 Ills., 296.

Where a composition agreement is made, the debtor professes to deal with all the creditors who enter into it on terms of perfect equality, and if at the same time he has a secret agreement with one of the creditors which gives him an undue advantage, this is a fraud upon the other creditors which vitiates the composition agreement: *McLean v. McLellan*, 29 U. C. Q. B., 548; *Huntington v. Clark*, 39 Conn., 540; *Hefter v. Cohn*, 73 Ills., 297; *Harvey v. Hunt*, 119 Mass., 279; *Bliss v. Matteson*, 45 N. Y., 22; *Lawrence v. Clark*, 36 id., 128; *Solinger v. Earle*, 82 id., 393, 60 How. Pr., 116; *Harlde v. Foster*, 53 N. Y., 385, 387; *Williams v. Schreiber*, 14 Hun, 38; *Germania, etc., v. Frost*, 43 N. Y. Supr.

Ct. R., 117; *Breck v. Cole*, 4 Sandf., 79; *Smith v. Salomon*, 7 Daly, 216; *Musgat v. Wybro*, 33 Wisc., 515.

In such case the creditors, although they may have received the amount named in the composition agreement, may sue for and recover the full amount of their original indebtedness, less the amount received under the composition agreement. It is not essential to the right of action that the creditor should first rescind the composition agreement and return the money he has received under it: *Hefter v. Cohn*, 73 Ills., 297; *Smith v. Salomon*, 7 Daly, 217.

A secret arrangement by a debtor, who compounds with his creditors, to pay one more than he does the others, is a fraud upon the others; and a mortgage given to carry out such an agreement is void: *Feldman v. Gamble*, 26 N. J. Eq., 494; *Solinger v. Earle*, 82 N. Y., 393, 60 How. Pr., 393; *Germania, etc., v. Frost*, 43 N. Y. Supr. Ct. R., 117; *Breck v. Cole*, 4 Sandf., 79.

At the time of payment under a composition deed, plaintiff, in pursuance of a previous arrangement, received a sum of money from the debtor, without the knowledge of the other creditors, in excess of the sum stipulated in the deed: Held, that in an action by the plaintiff against the debtor, upon the original obligation, upon the ground that the composition deed was fraudulently procured by the latter, the acceptance of such sum of money is not a bar to the action: *Elfelt v. Snow*, 2 Sawyer, 94.

A settlement induced by a third person upon a fraudulent statement that the debtor had left the country, and had placed in such third person's hands sufficient to pay 50 cents, which he offered in full, is fraudulent and may be avoided; though probably not without offering to return what was received on such settlement: *Turner v. Bonerman*, 29 U. C. Q. B., 187; *Lawrence v. Clark*, 36 N. Y., 129; *Harvey v. Hunt*, 119 Mass. 279; *Bliss v. Matteson*, 45 N. Y., 22; *Smith v. Salomon*, 7 Daly, 216.

See *Huntington v. Clark*, 39 Conn., 540, 556.

[4 Common Pleas Division, 385.]

June 10, 1879.

385]

## \*NORTHCOTE V. DOUGHTY.

*Infancy—Promise of Marriage—Ratification—Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2—Fresh Promise, Evidence of—Question for Jury.*

The defendant during his infancy made an offer of marriage to the plaintiff, which she accepted subject to the approval of his parents. He afterwards gave her an engaged ring, which she wore; and two days before he attained his majority he went into the country to visit his father, and on his return (the day after he came of age) he saw the plaintiff and told her that he had explained all to his father, and that he assented to the engagement,—adding, "Now I may and will marry you as soon as I can."

*Held*, that it was properly left to the jury to say whether this was a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy, so as to be avoided by the operation of the Infants Relief Act, 37 & 38 Vict. c. 62, s. 2.

*Cozhead v. Mullis*, 3 C. P. D. 439; 30 Eng. R., 285, distinguished.

**ACTION** for breach of promise to marry. The cause was tried before Lopes, J., at the last Michaelmas Sittings at Westminster. The evidence was as follows:

The acquaintance between the plaintiff and the defendant commenced early in January, 1877. On the 9th of March in that year the defendant asked the plaintiff to marry him, to which the plaintiff answered, "Yes, if your parents consent." On the 6th of April the defendant gave the plaintiff an "engaged ring," which she continued to wear until the 386] engagement was broken off. On the 17th of April the defendant went to his parents' house in Shropshire to celebrate his twenty-first birthday; and on the 18th he wrote to the plaintiff, saying that "he had told his father and mother all about it; and now he was the happiest fellow on the face of the earth." The defendant came of age on the 19th or 20th of April, and on the latter day, according to the plaintiff's evidence, he said to her, "Now I may and will marry you as soon as I can;" and the relations between the parties continued as before. The plaintiff's statement as to the conversation on the 20th of April, 1877, was corroborated by her mother and her sister.

The defendant swore that the plaintiff's acceptance of his offer on the 9th of March, 1877, was unconditional; his version of the transaction being this,—"I asked her in the morning if she would marry me, and she said she would give me an answer in the evening; and in the evening she said yes, and sealed it with a kiss." He admitted that the statement in his letter of the 18th of April was untrue.

It was submitted on the part of the defendant that the promise on the 20th of April, 1877, was a mere ratification of the promise previously made by him on the 9th of March, when he was under age, and was therefore invalid by reason of the provision in 37 & 38 Vict. c. 62, s. 2,—citing *Coxhead v. Mullis* (<sup>1</sup>); and that, if there had been a second promise, there was no consideration for it.

For the plaintiff it was insisted that the promise of the 9th of March, 1877, was conditional only on the defendant obtaining the consent of his parents; and that the only absolute promise was that of the 20th of April, when the condition was fulfilled, and the defendant had attained his majority.

The learned judge left the following questions to the jury,—1. Was any promise of marriage made by the defendant to the plaintiff before the 20th of April, 1877? If so, was it absolute or conditional?—2. Was there a new absolute promise then or afterwards? Was what then occurred merely a ratification of a promise made during infancy?—3. Did the defendant break his promise?—4. Did the parties mutually release each other before a breach on either side?

To these questions the jury answered,—That the first promise \*was conditional,—2. That another promise [387 was made on the 20th of April,—3. That the defendant broke it,—4. That there was no mutual release: and they assessed the damages at £75.

Nov. 30, 1878. *Yelverton* obtained an order *nisi* for a new trial on the ground of misdirection. He submitted that the learned judge should have told the jury that what took place between the parties after the defendant had attained his full age could only be a ratification of his original promise. He cited *Maccord v. Osborne* (<sup>2</sup>).

March 12 and June 10. *Kisch* showed cause: The contract or promise of the 9th of March, 1877, was conditional only. That of the 20th of April, therefore, could not be a mere ratification; it was a new absolute and unconditional promise to marry, the defendant being then in a position to make such a promise: *Harris v. Wall* (<sup>3</sup>); Leake on Contracts, 2d ed., 187. In *Coxhead v. Mullis* (<sup>1</sup>) there was no new promise. It is enough, however, to say that it was a question for the jury, and that their finding is conclusive.

*Yelverton*, in support of the rule: If the first promise

(<sup>1</sup>) 3 C. P. D., 439; 30 Eng. Rep., 285. (<sup>2</sup>) 1 C. P. D., 568; 18 Eng. Rep., 197.

(<sup>3</sup>) 1 Ex., 122.

1879

Northcote v. Doughty.

was conditional, it was a condition enuring to the plaintiff's benefit, which she might waive. Whether or not it was a binding promise on the defendant's part was a question for the judge and not for the jury. The substance of what took place between the parties anterior to the 20th of April was this,—In answer to the offer of marriage, the plaintiff says, "I (now) promise to marry you when your parents consent;" or, in other words, "We are engaged, but the engagement cannot be fulfilled until your parents consent."

[LOPES, J.: That would be a conditional promise. If it be a question *quo animo* the promise was made, surely that is for the jury.]

If the promise of the 20th of April was a fresh promise, where is the consideration for it, unless it relates back to the promise of the 9th of March? [The following authorities were cited: *Hutton v. Mansell*<sup>(1)</sup>; *Trupp v. Fielder*<sup>(2)</sup>; 388] *Cole v. Cattingham*<sup>(3)</sup>; \**Harvey v. Johnston*<sup>(4)</sup>; *Carter v. Scargill*<sup>(5)</sup>; Story on Contracts, § 70.

DENMAN, J.: I am of opinion that this rule should be discharged. The action is brought for the breach of a promise to marry. It appeared that in March, 1877, the parties had come together and the defendant offered the plaintiff marriage, and that she said she would accept him on condition that his parents approved of the engagement: and it further appeared that on the 6th of April an engaged ring was given by the defendant to the plaintiff. There was therefore good evidence of an engagement and promise by the defendant to marry the plaintiff, and of her acceptance of his offer subject to the condition imposed by the plaintiff. At this time the defendant was not of age. On the 18th of April, he being then in Shropshire on a visit to his parents, he sent a letter to the plaintiff telling her that he had informed his father and mother of his engagement, and had obtained their consent; and on the 20th (on which day he attained his majority) he had an interview with the plaintiff, in the course of which he said to her, "Now I may and will marry you as soon as I can." Four questions were left by my brother Lopes to the jury. The first was whether any promise of marriage was made by the defendant to the plaintiff before the 20th of April, 1877; and, if so, was it absolute or conditional. That question is not complained of. The second question was whether there was a new absolute promise then or afterwards, or whether what then

<sup>(1)</sup> 3 Salk., 16.

<sup>(3)</sup> 8 C. & P., 75.

<sup>(2)</sup> 2 Esp., 627.

<sup>(4)</sup> 6 C. B., 295; 6 D. & L., 120.

<sup>(5)</sup> Law Rep., 10 Q. B., 564; 14 Eng. R., 365.

occurred was merely a ratification of a promise made during infancy. The jury found that a new absolute promise was made on the 20th of April; and upon the other questions they found that the promise was broken, and that there was no release. It was contended for the defendant that *Coxhead v. Mullis* <sup>(1)</sup> showed that, in such a case as this, where there has been an original engagement during minority, any such language as this, if capable of being construed as a ratification, must be so construed, and that, by virtue of the Infants' Relief Act, 1874, no action can be brought upon a mere ratification when of full of age of a contract made during \*infancy. The only question, therefore, which [389 we have to determine is, whether it was a misdirection to leave the second question to the jury as it was left. *Coxhead v. Mullis* <sup>(1)</sup> is relied on to show that it was. Now, it appears to me that that case is clearly distinguishable. It was there held, upon the facts proved, that, though the conduct of the defendant after he became of full age amounted to a ratification of the promise made by him during his minority, the nonsuit was right; for, assuming that there was a ratification, the plaintiff's right of action was taken away by the statute, and there was no evidence of a fresh promise made after the defendant came of age. Lord Coleridge, C.J., says <sup>(2)</sup>: "The action is brought against a person of full age, for the breach of a contract of marriage which he undoubtedly had made when an infant. There had been various disputes between the parties, and finally the engagement was broken off after the defendant had become of full age. It was admitted that there had been no fresh contract or promise after the defendant came of age; or, at all events, there was no evidence of any such fresh promise. There had been a clear promise before, and there was abundant evidence of ratification, if ratification alone would do, after the defendant attained his majority. Before saying a word upon the question whether the act applies, I may observe that I am of opinion that, where there is a clear promise such as was proved in this case,—a promise to marry being in this respect like any other contract,—ratification, if it exists, must have reference to the contract proved; and you cannot say, because there is a ratification from day to day, that there is a fresh promise from day to day. Evidence of ratification is one thing, evidence of a fresh promise is another; and, if there is positive proof that the promise was made before and the ratification after the defendant be-

<sup>(1)</sup> 3 C. P. D., 439; 30 Eng. Rep., 285.

<sup>(2)</sup> 3 C. P. D., at p. 441; 30 Eng. R., 287.

1879

Northcote v. Doughty.

came of full age, supposing that the act applies to such a case, I am of opinion that the ratification would not be evidence of a fresh promise, but must be referred to the promise made before the defendant was of age." The decision in that case was that the statute applies to contracts of marriage; and we are bound by it; but it turns upon the clear admission that there had been no fresh promise after the defendant came of age. Here there was ample evidence 390] of a fresh \*promise; and we are not bound to hold that, in every case in which it can be construed as a ratification, the new promise must be taken to be evidence of ratification. Now, what are the words of s. 2? [His Lordship read them.] I do not say that the words are as strong as might have been used; and a jury may be warranted in saying that the language relied on amounts only to a ratification of a previous promise. It is not matter of law. It appears to me that, in all cases where the language is such as was used here, it is for the jury to say whether the defendant meant to make a fresh engagement to marry the plaintiff, or merely to ratify a former promise. I think my Brother Lopes could not have withdrawn the matter from the jury without taking upon himself to decide a question of fact. Though in this action *conduct* may make out a promise of marriage, it is reasonable to hold it to be a mere ratification; yet if, after coming of age, direct words of promise are used, it is more reasonable to refer them to a fresh promise to marry rather than to a ratification of a former promise. It is enough, however, to say, that here it was a question for the jury. I lay no stress upon the question whether the original promise was founded on a different or the same consideration as the subsequent promise. It is safer not to do so; the words of the act are so strong that if the question turned upon a fresh consideration I should hesitate to say that Mr. Kisch has made out his case. But the real point here is whether the question, whether the defendant's language amounted to a mere ratification only or to a fresh promise, was for the jury. I think it was, and consequently that the verdict must stand.

LOPES, J.: I am of the same opinion. The plaintiff's evidence was that on the 9th of March she agreed to accept the defendant's offer of marriage provided his parents approved of it; and that on the 6th of April he gave her an engaged ring. Nothing material appeared until the 18th of April, when the defendant wrote to the plaintiff telling her that he had mentioned their engagement to his parents, and they gave their consent. On the 19th the defendant became

of age, and on the 20th he had an interview with the plaintiff, in the course of which he said, "Now I may and will marry you as soon as I can," to which she assented. Is it said \*that I should have told the jury that what [391] took place upon that occasion was a mere ratification of the promise of the 9th of March, and could not amount to anything else. It appears to me that it was a question of intention,—did he intend to make a new absolute promise, or merely to reaffirm the old promise? I thought that this being a question of intention it could not be for me, but was one which I ought to leave to the jury; and I think so still. The case of *Coxhead v. Mullis* (\*) is distinguishable on the ground stated by my Brother Denman. I was a party to that decision. There was no evidence in that case of any contract or promise made after the defendant came of age; all that was proved was that the parties conducted themselves in the same way as before.

*Order dismissed, with costs.*

Solicitors for plaintiff: *Kisch, Son & Hanbury.*

Solicitor for defendant: *James Goren.*

(\*) 3 C. P. D., 439; 30 Eng. Rep., 285.

See 17 Eng. Rep., 129 note; 18 id., 202 note; 20 id., 663, 664 note; 25 Am. R., 30 note.

The necessities for which an infant is liable are such things as are necessary to his support, use, and comfort, comporting with his condition and circumstances in life, and he is liable for necessities furnished his wife: *Price v. Sanders*, 60 Ind., 311.

An infant is not liable at law on his promissory note or other contract for money by him thereby obtained to be used in improving, repairing or working his farm, nor is he liable thereon though the money obtained be expended for necessities: *Price v. Sanders*, 60 Ind., 311; *Morton v. Steward*, 5 Bradw. (Ills.), 533.

The indebtedness for necessities for which an infant is liable must be created directly for necessities: *Price v. Sanders*, 60 Ind., 311.

Where the creditor shows that money furnished by him was expended by his infant debtor for necessities or in paying a debt incurred for necessities, the latter is liable in equity to the former, who stands in the place of the person furnishing the necessities: *Price v. Sanders*, 60 Ind., 311.

30 ENG. REP.

Whether contracts of infants are void or voidable, may be thus determined:

"When the court can pronounce the contract to be to the infant's prejudice, it is void—when to his benefit, as for necessities, it is good—and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant: *Swafford v. Ferguson*, 3 Lea (Tenn.), 292.

The contract of an infant is not void, but merely voidable. No one but his legal representative after his death, or his privies in blood, entitled to the estate upon the avoidance of the contract, can disaffirm it: *Bozeman v. Browning*, 31 Ark., 364; *Towle v. Dresser*, 25 Alb. L. J., 439, Supreme Court, Maine.

A deed or contract for the sale of land by an infant is not absolutely void, but may be either affirmed or avoided after he attains majority: *Gillespie v. Bailey*, 12 West Va., 70; *Ferguson v. Bobo*, 54 Miss., 121; *Davis v. Dudley*, 70 Maine, 236.

In Virginia it is held, that an infant or married woman cannot, during such disability, affirm or disaffirm a voidable contract: *Shanks v. Edmonson*, 28 Gratt., 804.

Though in *Maine*, and *Missouri*, and

1879

Northcote v. Doughty.

*New York*, it is held an infant may, before majority, disaffirm a voidable contract as to chattels: *Towle v. Dresser*, 25 Alb. L. J., 439, Supreme Court, Maine; *Betts v. Carroll*, 6 Mo. App., 518; *Stafford v. Roof*, 9 Cow., 626, reversing 7 id., 179.

An action for a breach of promise to marry will not lie against an infant, even though the plaintiff may, by reason of such promise, have been induced to allow him to have connection with her: *Leichtweiss v. Treskow*, 21 Hun, 487.

Mere lapse of time after reaching majority, short of a period sufficient to constitute a defence under the statute of limitations, will not preclude disaffirmance by an infant: *Gillespie v. Bailey*, 12 W. Va., 70; *McCulloch v. Wellington*, 21 Hun, 5; *Green v. Green*, 69 N. Y., 553; *Sims v. Erhardt*, 103 U. S. R., 300; *O'Dell v. Rogers*, 44 Wisc., 136; *Davis v. Dudley*, 70 Maine, 236.

Nor by reason of the fact that the purchaser has expended large sums in improvements: *McCulloch v. Wellington*, 21 Hun, 5; *Davis v. Dudley*, 70 Maine, 236.

To maintain an action based upon his avoidance of his contract, an infant must give notice of his election to avoid: *Betts v. Carroll*, 6 Mo. App., 518; *Davis v. Dudley*, 70 Maine, 236.

An infant who sells real estate, and places his vendee in possession, must, if he desires to disaffirm the contract, do so within the period of limitation after he becomes of age, and if the statute begins to run during his life, it will continue as against his representatives. Upon a bill in chancery to disaffirm the contract and recover the land by the infant or his representatives, the purchase-money must be tendered back to the purchaser: *Bozeman v. Browning*, 31 Ark., 364; *Davis v. Dudley*, 70 Maine, 236.

A re-entry by an infant for the purpose of disaffirming his deed, with notice of such intent, is sufficient to avoid the deed: *Green v. Green*, 69 N. Y., 553.

Conveyance by an infant after majority, of lands previously conveyed while an infant, operates as a disaffirmance, though void as a conveyance on account of adverse holding by the prior grantee. If the infant, by entry or oth-

erwise, prior to the second grant, have obtained possession, the second conveyance is valid for all purposes: *Riggs v. Fisher*, 64 Ind., 100.

The commencement of a suit by an infant for damages against the constable who levied upon the property as that of the infant's vendee, cannot affect the *status* of the property at the date of the levy: *Betts v. Carroll*, 6 Mo. App., 518.

Under certain circumstances an infant will be compelled to refund the purchase-money, the purchaser being required to account for rents and profits: *Gillespie v. Bailey*, 12 W. Va., 70; *Schaeffer v. Causey*, 8 Mo. App. R., 142, 145, and cases cited.

But see *McCulloch v. Wellington*, 21 Hun, 5; *Green v. Green*, 69 N. Y., 553; *Towle v. Dresser*, 25 Alb. L. J., 439, Supreme Court, Maine.

The doctrine that where an infant has executed a contract and has enjoyed the benefit of it, and afterwards, on coming of age, seeks to avoid it, he must restore the consideration which he has received, that he cannot have the benefit of the one side without restoring the equivalent on the other, may, and certainly does, apply in certain cases, but as a general rule is unsound. It certainly has no application to wagering, gambling contracts upon stock: *Ruchizky v. DeHaven*, 97 Penn. St. R., 202.

If an infant becomes a partner with another, puts a sum of money into the business under an agreement to share in the profits, and does work for the partnership, he cannot afterwards, by rescinding the contract, recover of his partner the money so paid, or for the labor performed, in the absence of an express promise to pay him therefor: *Page v. Morse*, 128 Mass., 99.

Where the whole amount deposited by a minor as margins is lost in wagering, stock gambling contracts, he is at liberty to recover back, at any time, from the brokers employed by him, the amount so deposited: *Ruchizky v. DeHaven*, 97 Penn. St. R., 202.

If an infant, on arriving at majority, have what he has received under a contract, and afterwards convert it to his own use, such conduct amounts to stand by the contract: *Robinson v. Hoskins*, 14 Bush, 393.

If, where an infant repudiates his



contract, he still has in his possession, and capable of restoration, the consideration received by him for the obligation assumed, he must surrender it, and thus far place both parties in *statu quo*: *Betts v. Carroll*, 6 Mo. App., 518.

See *Towle v. Dresser*, 25 Alb. L. J., 439, Supreme Court, Maine.

Where an infant has properly repudiated his contract, demanded a return of the property he sold, he may maintain trover therefor: *Towle v. Dresser*, 25 Alb. L. J., 439, Supreme Court, Maine; *Stafford v. Roof*, 9 Cowen, 626.

Where it does not appear that an infant had the property purchased on reaching majority, a demand thereof after majority will not render him liable on contract therefor, or in tort for a conversion thereof: *Munger v. Hoss*, 28 Barb., 76.

The contracts of an infant at common law cannot be enforced, except for necessities. Where the infant represents himself of age and thus obtains the credit, he is liable in an action on the case for damages: *Hughes v. Gallans*, 2 Leg. Chron. Rep., 246; *Ferguson v. Bobo*, 54 Miss., 121.

An infant of proper age and discretion may be estopped by his silence or acts from disaffirmance as against a

purchaser from the infant's grantee, on the principle that the infant is liable for his trespasses or frauds: *Ferguson v. Bobo*, 54 Miss., 121.

See *contra*, *Sims v. Everhardt*, 102 U. S. R., 300; *O'Dell v. Rogers*, 44 Wisc., 136.

As to the rights, remedies, and obligations of an infant heir in real estate illegally sold under a surrogate's order, and in the proceeds of such sale, see *O'Dell v. Rogers*, 44 Wisc., 136.

A son, as such, has no authority to act as his father's agent. Mere authority in a son to keep his father's books and accounts and to figure the interest due on notes, does not show authority in the son to collect and settle such notes and accounts: *Reynolds v. Ferree*, 86 Ills., 570.

The doctrine of ratification of an unauthorized act in behalf of another is, that the principal shall be fully and fairly informed of all the facts and circumstances of the transaction. The acceptance of corn in payment on notes, not in value equal to the sum due on the notes, under an arrangement made by the party's son without authority, will not bind the father to the son's agreement to take the corn in full satisfaction, unless the father is informed of such agreement before he accepts: *Reynolds v. Ferree*, 86 Ills., 570.

[4 Common Pleas Division, 396.]

May 13, 14, 23, 1879.

### \*THE EMMA SILVER MINING COMPANY, Limited, [396 V. LEWIS & SON.

*Company*—"Promoters"—*Metal Brokers of Mine*—*Fiduciary Relation*—*Secret Profits out of Sale to Company*—*Liability to refund*.

The defendants, metal brokers, having previously sold ore of an American mine on a commission of 2½ per cent., arranged with a proprietor to assist in selling the mine to a company to be raised by him in England. He was to procure the appointment of the defendants as metal brokers of the company at the usual rate of English commission, viz., 1 per cent., and he promised that the defendants should be liberally remunerated to the extent at least of £5,000 for their assistance, and to compensate for the loss of the higher commission. They were, as he knew, acquainted with facts detrimental to the reputation of the mine, and he promised the liberal remuneration to insure their silence respecting them.

The defendants assisted him in his endeavors to sell the mine to a company to be formed for the purchase of it, but left him to fix the price, get up the company, and manage all details respecting the sale. He procured the formation of the plaintiff company and the purchase by it of the mine for £100,000, half to be paid in cash and half in paid-up shares. The defendants were appointed metal brokers of the company at the 1 per cent. commission, allowed themselves to be named in the pro-

1879

Emma Silver Mining Co. v. Lewis.

spectus as being ready to answer any inquiries relating to the mine, and answered such inquiries, but kept silence with respect to the detrimental facts known to them. Payment having been made for the mine to the proprietor, 250 fully paid-up shares out of those received from the company were transferred by him to the defendants, and were subsequently sold, and the proceeds received by them. This transaction was not disclosed to the company.

In an action to recover the proceeds as secret profits made by promoters, the judge 397] \*left the question of promotership, without any definition, to the jury, who found that the defendants were promoters, and gave a verdict for the plaintiff:

*Held*, that there was ample evidence for the jury, and that the learned judge was not bound to give them a definition of the term "promoter;" that it has no very definite meaning, but involves the idea of exertion for the purpose of floating a company, and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it; and that the defendants were in a fiduciary relation to the company, and therefore liable to refund the secret profits, even although the contract of sale was not rescinded.

ACTION for conspiracy, and to recover secret profits made by the defendants as promoters of the plaintiff company on the sale of a mine.

The action was tried at Westminster before Denman, J., and a jury. It appeared at the trial that the Emma Silver Mine in America was in 1871 in the possession of Trevor William Park and others, who wished to sell it. Prior to July, 1871, the defendants, metal brokers at Liverpool, had been selling about one-half of the produce of the mine for the usual commission on sales for American companies, viz., 2½ per cent.

On the 17th of July the defendant Arthur Lewis, being then in America, began a correspondence with his father, the defendant James Lewis, by a letter written from the neighborhood of the mine, stating that he, Arthur, contemplated giving assistance to mine owners in selling their mines to companies for a consideration of some kind, whether in money payments or by obtaining the sale of the ore, or allotments of shares or otherwise. A number of confidential letters passed between the father and son. From this correspondence it appeared that Arthur Lewis visited the Emma Mine and ascertained that it was of doubtful character; that a Professor Silliman who had given a favorable opinion of it was in popular estimation not trustworthy; that he, Arthur Lewis, was asked by Park to report upon it and to help him to place it on the English market, and would be willing to compensate the defendants liberally for their assistance. The defendants entertained the proposals. Park went to London, where the defendant James Lewis introduced him to a Mr. Taylor and another person likely to be instrumental in forming a company to purchase the mine, and was promised 398] handsome remuneration, viz., £5,000 at the \*least,

and if Park sold the mine at his own price £10,000. The persons introduced by James Lewis did not, however, become the purchasers. On the 8th of November, 1871, the plaintiff company was registered. The memorandum of association stated the first of the objects for which the company was established to be "the carrying out of an agreement dated the 4th of November, 1871, between Trevor William Park of the one part and George Henry Dean of the other part." The capital of the company was £1,000,000 in 50,000 shares of £20 each. By the agreement of the 4th of November, Dean, as trustee for the intended company, agreed, on behalf of the company, to purchase the mine, &c., for £1,000,000, of which £500,000 were to be paid in cash and the residue in shares of the company. This agreement was mentioned in the articles of association as being adopted by the company. On the 9th of November the prospectus of the company was issued. It stated that the defendants would be ready to answer any inquiries relating to the ores and also as regarded the mine, one of their firm having been at the mine for some time. The defendants swore that they gave no express authority for this use of their names, but on the 11th of November James Lewis wrote to Arthur Lewis in America, sending a paper with the prospectus, and saying that he was writing to Park to let him have half the amount he promised him in paid-up shares. Between the 11th and 23d of November several letters passed between James Lewis and persons who had received the prospectus, referring to the paragraph stating that one of the firm had been at the mine for some time, and that they would be ready to answer inquiries as to the mine, and inquiring whether Lewis & Son believed all that was stated in the prospectus. The answers to these letters varied in language to some extent, but they were all to the effect that the figures given in the prospectus as to the quality of the ore sold by the firm and the amount realized were perfectly correct, but that they could guarantee nothing further, and that the persons inquiring must act upon their own judgment as to whether they applied for shares. They also inclosed a copy of the prospectus and a copy of a report by Professor Silliman as to the mine, and stated that "the future of the mine entirely depended on the full realization of the report" as to whether it was a true fissure \*vein or [399 merely a deposit. "He speaks," wrote James Lewis in one of the letters, "very decidedly on this point, and is considered a great authority in the States." On the 23d of November a minute was entered in the company's books stating

that it was arranged that the present consignees, viz., another firm of metal brokers and the defendants, be continued for the present, reducing the commission to 1 per cent.

The defendants in the course of their evidence said that the remuneration to be received by their firm for their assistance was in consideration of the loss they would be put to by only receiving 1 per cent. commission instead of  $2\frac{1}{2}$  per cent. on the sale of the ore.

The purchase-money was paid, and £500,000 value in shares allotted to the vendors, including 250 which were afterwards transferred from Park to Arthur Lewis. These 250 were sold for the defendants pursuant to a previous arrangement under which the defendants received £5,968 15s. of the proceeds. This sum and dividends upon 250 shares and interest the plaintiffs claimed to recover, as money received by the defendants as trustees for the company, and under circumstances rendering the defendants liable to refund.

The learned judge in summing up the case to the jury explained to them the nature of the claim, and said that it was not only based on conspiracy and fraud but was also put thus: viz., that the defendants were promoters of a company, and that being promoters of a company they so conducted themselves as to make them liable to refund their ill-gotten gains. Then, after fully stating the evidence, his Lordship again put before the jury the contention by the plaintiffs in the following terms, viz., it is said "that the defendants were promoters of the company; that they so acted in assisting Park and assisting Stewart, and in going to Taylor and other matters; that even though the company might at the last moment have come into existence only by reason of some great financier coming forward and finding the money for the company, still they were in the common sense way of using the word promoters. Now I cannot lay that down to you, nor have I really at present any confident opinion whether that is or is not a true view of the law as to 400] promoters, and whether by law they \*were promoters or whether they were not. I do not intend to give you any ruling about it, but I intend to assume it at present to be a question upon which there is some evidence to go to a jury, not meaning by that to say that there is evidence on which a jury ought or ought not to find it, but to ask you the question, as I intend to do. I think I need not elaborate more nor explain more to you." Finally, the learned judge left a number of questions to the jury, who were unable to agree upon those relating to the conspiracy and fraud, but

as to the question, "Were the defendants promoters of the company?" found that they were, and gave a verdict for the plaintiffs for the amount claimed.

The case was adjourned and heard on further consideration, when both sides claimed judgment, the defendants on the ground that there was no evidence which ought to have been left to the jury. After argument Denman, J., delivered a written judgment, setting forth the facts of which an outline has been given above, and holding that that was evidence upon which the jury might reasonably find that the defendants were promoters, and, at all events, that they were liable to refund the profits received by them in the shape of shares for which the company had received no consideration. His Lordship therefore gave judgment for the plaintiffs, for the sum awarded by the jury in respect of that part of the claim which consisted of a claim "for profits received by the defendants for the use of and as trustees for the plaintiffs."

A rule *nisi* having been granted on the grounds, First, That the judge misdirected the jury in telling them there was evidence of the defendants being promoters of the plaintiffs' company, or of their liability as such promoters, there being no such evidence. Secondly, That the judge further misdirected the jury in telling them that there was evidence of the shares received by the defendants being the shares of the company, and being received by the defendants under such circumstances as to render the defendants liable to the plaintiffs for the amount received by them for such shares, there being no such evidence. Thirdly, That the judge omitted to direct the jury as to what should guide them in finding the defendants to be promoters, or in finding that the defendants were liable to repay the amount received by \*them. Fourthly, That the verdict found by the [401] jury for the plaintiffs was against the weight of evidence given at the trial.

*Sir John Holker, A.G., Gorst, Q.C., and C. E. Bowen,* showed cause: The direction by the learned judge was proper and sufficient, and the findings of the jury were right on the facts. First, if the defendants were promoters of the plaintiff company, and, under a bargain with Park, got a profit out of moneys of the company without disclosing the transaction, they became liable to pay over to the plaintiffs all the money received. This doctrine is now fully recognized at common law, but, were it not so, the rules of equity would prevail, and recent cases in chancery establish it: *Bagnall*

1879

Emma Silver Mining Co. v. Lewis.

v. *Carlton* ('). The question there was, as here, simply whether the promoters should refund, not whether the contract should be rescinded, and, as Denman, J., said in his judgment, that case "clearly establishes that persons who know that the sum they are to receive is to come out of the secret profit which persons standing in the position of trustees for the company are going to put into their own pockets, are themselves in a fiduciary relation to the company, and answerable as trustees to refund any profits so made by themselves at the expense of the company."

Secondly, the defendants were, in fact, promoters. Promotership is a question of fact, not of law, and was so treated by Jessel, M.R., in *Emma Silver Mining Company v. Grant* ('). If one takes part in getting up a company or enters into an arrangement that it shall be got up, he and each of the parties to the arrangement will be responsible for the acts of the others done in consequence of it to get up the company.

The correspondence here shows that there was such an arrangement. "The words promoter, director, or trustee, include persons engaged in forming the company, or engaged in inducing the public to take shares in it when formed:" 1 Lindley on Partnership, 4th ed., p. 116. It is neither possible to define nor prudent to attempt to define "promoter," and no definition is settled by authority. But the nature of 402] promotership is clearly demonstrated \*in *Thoycross v. Grant* (') and other cases. There is nothing to limit it to the time before the actual registration of the company; nor to obtaining an act of Parliament: *In re Barry Railway Company* ('). The question of privity of contract between the promoters does not arise. And "it is not necessary in order to make one man liable for the tortious acts of another that the relation of principal and agent should subsist between them:" per Willes, J., in *Upton v. Greenlees* (').

Where persons take part in getting up a company, or enter into an arrangement that it shall be got up, they and all the parties to the arrangement are responsible for the acts of each other done to effect the common object.

The correspondence shows such an arrangement.

[They examined and commented on the evidence.]

The learned judge did not misdirect in not telling the jury that there was no evidence of promotership. The evidence

(1) 6 Ch. D., 371; 22 Eng. Rep., 703.

(5) 2 C. P. D., 469; 21 Eng. Rep., 387.

(2) 11 Ch. D., 918.

(4) 4 Ch. D., 315.

(6) 25 L. J. (C.P.), 44, at p. 54.

of it was abundant. The defendants agreed to assist Park, were in a position to do so materially, and exerted themselves both before and after the incorporation to promote the company and to get shareholders. Their mere silence as to the doubtful character of the mine, and of Silliman who reported in its favor, assisted the formation of the company. There was evidence of the 250 shares being part of the £500,000 worth, for the correspondence between the defendants, their agreement with Park to let Grant hold the 250 shares, and the books of the company, all proved it. There was abundant evidence that the shares were received under such circumstances as rendered the defendants liable to the plaintiff. Jessel, M.R., has refused to define "promoter," anticipating that attempts would at once be made to escape from any legal definition of it. A jury would be embarrassed rather than assisted by a definition. The term is not one of art or law. Therefore Denman, J., was right in not defining it. It was also unnecessary to tell the jury that the defendants were liable in law to refund, for if the jury found them to be promoters the liability would follow.

Lastly, the verdict was not against the weight of evidence.

\**Sir Henry James, Q.C., Herschell, Q.C., and R. [403 Henn Collins*, in support of the rule: The evidence was quite insufficient to establish promotership, and the jury should have been told so. True the defendants may have assisted Park. But he was a vendor and not a promoter, in any sense which would deprive him of his right to keep every penny of the purchase-money paid for the mine. Moreover, to assist one who is forming a company is not necessarily to promote it. The defendants did no acts constituting them promoters. The introductions which they gave to Park were without result. They neither helped to create nor to procure the incorporation of this company. An attempt to form some company would not suffice, the promotion must be of this particular company. Silence as to the character of the mine cannot be treated as an act of promotion, for the vendor had no duty to reveal what he knew to its disadvantage, nor had the defendants who were acting in his interest.

[*LORD COLERIDGE, C.J.*: In *Fox v. Mackreth* (<sup>1</sup>) Lord Thurlow, C., puts this case, "Suppose A. knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for

(<sup>1</sup>) 2 Cox, 320; 1 White & T. L. C., 5th ed., p. 146.

the purchase of that estate at only half its real value, can a court of equity set aside this bargain? No.”]

If the purchase-money cannot be recovered from the vendor, it cannot be recovered from a third person to whom he has paid part.

[LORD COLERIDGE, C.J.: What if the vendor said to the third person, “I will charge an additional £500 which you shall have?”]

The transaction would be unimpeachable.

[LINDLEY, J.: But if he referred the vendee to a third person for information and the third person made false statements?]

Then a fiduciary relationship would be created by the undertaking to give information. The defendants, however, at most only expressed their opinion, just as brokers do, and were careful to warn inquirers to judge for themselves of the investment. The only act which can be for a moment looked upon as an act of promotion was the fact of the defendants allowing their names to \*appear in the prospectus. But that is not enough. If it were, every solicitor, or banker, or broker, to a company might be made liable as a promoter, because he was mentioned in the prospectus.

A “promoter” may be, first, one who creates or takes some steps towards creating the company; secondly, one who does an act which assists to form a company; thirdly, one who aids in procuring shareholders after the formation. But *non constat* that any such promoter is in a fiduciary capacity towards the company. It is the fiduciary relation, and not mere promotion, which creates the trust, and the jury should have been so instructed. In *Erlanger v. New Sombrero Phosphate Co.* (<sup>1</sup>), Lord Cairns, L.C., after stating that the plaintiffs were promoters says, “it is now necessary that I should state in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and molding of the company; they have the power of defining how, and when, and in what shape, and under what supervision it shall start into existence and begin to act as a trading corporation.” No such power had the present defendants. In *Gover’s Case* (<sup>2</sup>) the court did not hold that the contract of purchase made with the owner of the patent, afterwards sold by the purchaser to a trustee for an intended company, shares in which were to be handed over to the owner in part payment, constituted the pur-

(<sup>1</sup>) 3 App. Cas., 1218, at p. 1236; 24 Eng. R., 774.

(<sup>2</sup>) 1 Ch. D., 182.



chaser a promoter. In *Bagnall v. Carlton* (') the two defendants, who even prepared the skeleton prospectus and introduced the vendor of the property to the promoters of the company created to work it, and received a commission, were dismissed the action for the rescission of the contract of purchase. The passage cited from 1 Lindley on Partnership, 4th ed., p. 116, has reference to *Twycross v. Grant* ('), the decision of which however was only that, if the defendants were promoters before, they did not cease to be so at the moment when the company was constituted. But that case is no authority to show that if the acts of promotion had stood alone they would have rendered the defendants liable. Cockburn, C.J., says, "The question as to when one who in the outset was a promoter of \*a company [405 continues or ceases to be so, becomes, as it seems to me, one of fact. A promoter, I apprehend, is one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose." Lindley on Partnership, 4th ed., vol. i, pp. 584-5, points out that "there is often a difficulty in determining when a promoter of a projected company begins to be in such a position as to be unable to make a secret profit by a sale to it, or to persons acting on its behalf. On the one hand it is quite plain that a fiduciary relation between a promoter and a company may exist long before the actual formation of a company by registration or otherwise. On the other hand, it is obvious that something must be done beyond a purchase and resale to constitute such a relation; something must, it is submitted, be done by the promoter to impose upon him the duty of protecting the interests of those who ultimately form the company. . . . He does not assume such duty by negotiating with persons who have themselves assumed that duty and are in no way under his influence." Here the defendants had no governing voice, or controlling influence over the creation of the company. The learned judge was not bound to give an exhaustive definition of the term "promoter," but should have explained it to the jury. The money was not, as in *Bagnall v. Carlton* ('), money of the company earmarked and in the hands of the vendor. The shares were handed to the vendor of the mine under a contract of purchase which has never been rescinded. They became his property and were transferred by him to the defendants for good consideration. Therefore the proceeds cannot be followed by the company.

*Cur. adv. vult.*

(') 6 Ch. D., 371; 23 Eng. R., 1.

(\*) 2 C. P. D., 469; 21 Eng. R., 387,

May 23. LINDLEY, J., delivered the judgment of the Court (Lord Coleridge, C.J., Denman and Lindley, JJ.)

There was abundant evidence to show, and indeed it was in our opinion clearly proved :

1. That the defendants knew that Park came over here to sell the mine to a company, to be got up by himself and such persons as he could induce to assist him.

406] \*2. That the defendants were prepared to assist, and did assist, Park in his endeavors to sell the mine here to a company to be formed for the express purpose of purchasing it.

3. That the defendants had been metal brokers to the former owners of the mine at a commission of  $2\frac{1}{2}$  per cent., and that there was an understanding between the defendants and Park that he should, if he could, procure them to be appointed the metal brokers of the new company at the usual English commission of 1 per cent.

4. That there was first an understanding, and secondly a verbal promise, that the defendants should be liberally remunerated by Park for their services and for their loss of commission.

5. That this remuneration was in some shape or other to come out of the purchase-money to be paid by the company.

6. That the defendants left Park to fix the price of the mine, to get up the company, and to manage all details with the company, and trusted him to protect their interests.

7. That Park, Grant, and others accordingly procured the plaintiff company to be formed, and procured it to buy the mine for £1,000,000, of which £500,000 was to be paid in cash, and £500,000 in paid-up shares of the company.

8. That the defendants became metal brokers to the new company on the terms of being paid the usual English commission of 1 per cent., and allowed themselves to be referred to in the prospectus of the plaintiff company for information concerning the mine; and, so far as such reference might induce people to take shares, the defendants themselves indirectly assisted in procuring shares to be taken.

9. That the defendants knew more of the mine and of its doubtful value, and of the grounds for distrusting Silliman's report in its favor, than they chose to disclose; and Park was aware of this, and promised the defendants liberal remuneration to insure silence on their part, even when referred to for information.

10. That the defendants, when referred to, were studiously careful to preserve that silence which was essential, or, at least, conducive to floating the company.

11. That pursuant to the above understanding and verbal promise, Park gave the defendants 250 fully paid-up shares of the \*company out of the shares given to him by [407 the company for the mine; and Park entered into an agreement with the defendants respecting the disposal of the shares, so as not to injure the sale of other shares held by himself and others who had assisted him in forming the company.

12. That all these facts (except the appointment of the defendants to be metal brokers at the usual commission of 1 per cent. and the reference to the defendants for information) were studiously concealed from the plaintiff company.

Under these circumstances the jury found the defendants to be promoters of the company, and to be liable to restore to the company the value of the 250 shares obtained by them.

It is said that there was no evidence to go to the jury of the defendants being promoters of the company, in the proper sense of that expression; that there was no sufficient explanation of the proper meaning of the word given to the jury; and that the defendants were entitled to judgment, or, at all events, to have a new trial.

With respect to the word "promoters," we are of opinion that it has no very definite meaning; see *Twycross v. Grant* (\*). As used in connection with companies the term "promoter" involves the idea of exertion for the purpose of getting up and starting a company (of what is called "floating" it) and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it. It is now clearly settled that persons who get up and form a company have duties towards it before it comes into existence: see *Bag-nall v. Carlton* (†) and per Lord Cairns, C., in *Erlanger v. New Sombrero Phosphate Co.* (‡).

Moreover, it is in our opinion an entire mistake to suppose that after a company is registered its directors are the only persons who are in such a position towards it as to be under fiduciary relations to it. A person not a director may be a promoter of a company which is already incorporated, but the capital of which has not been taken up, and which is not yet in a position to perform the obligations imposed upon it by its creators.

\*The defendants say they owed no duty to this [408 company. But in our opinion this contention cannot be

(\*) 2 C. P. D., 469; 21 Eng. R., 387. (†) 6 Ch. D., 371; 23 Eng. Rep., 1.

(‡) 3 App. Cas., 1218, at p. 1236; 24 Eng. Rep., 774.

supported. In the first place, the defendants left Park to get up the company upon the understanding that they as well as he were to profit by the operation; they were behind him; they were in the position of undisclosed joint adventurers; and in respect of their interest his obligations and theirs are in our opinion undistinguishable. The defendants in fact were, partly by assisting Park and partly by leaving him to do the best he could for them as well as himself, in the position of promoters of the company.

In the next place, the defendants became the metal brokers of the company; and it became their duty not to take from the company for their appointment or services a greater remuneration than the company knew they were getting. The company agreed to pay the usual commission of 1 per cent., and had no idea that the defendants were getting £5,000 in addition to a bonus. Whether this bonus was for services to Park in assisting him in getting up the company or for loss of commission, or partly for one and partly for the other, seems to us immaterial. In any view, the defendants, being agents of the mine, obtained a large profit from the company through the instrumentality of Park. This profit was concealed from the company, and cannot be retained by the defendants.

Again, the acceptance by the defendants of the reference to them in the company's prospectus, imposed upon the defendants a duty to the company to answer candidly such inquiries as might be made by intending applicants for shares. The defendants by this acceptance undertook the duty of assisting to float the company, by answering the inquiries of persons proposing to take shares in it; and they did in fact answer inquiries in such a way as to allay suspicion.

Upon these grounds we are of opinion that there was ample evidence to warrant the finding and verdict of the jury; and in our opinion an elaborate explanation of the meaning of the word "promoter" would not have been of any advantage to the defendants, nor calculated to give any real assistance to the jury in drawing proper conclusions from the facts.

It has, however, been urged that the company have not  
409] rescinded \*their contract with Park; and that so long as that contract remains unrescinded the shares given by him to the defendants must be treated as having been his to give, and that the company cannot claim them. But the moment it is proved, as in this case it is, that the £1,000,000 paid by the company, although nominally paid for the mine, was only colorably so; that some portion of that sum, say

£5,000, was not for the mine at all, as the company supposed, but was for something very different, e.g., the remuneration of the Messrs. Lewis, and that the company was, without knowing it, really paying them for, *inter alia*, their acceptance of the office of metal brokers, and for concealing their own misgivings as to the mine, and when it is further proved, as it is, that the shares paid to the defendants were created for the purpose of paying them, and the company was never informed of this, it follows in our opinion that the company can recover from the defendants what they have thus obtained, without rescinding its contract with Park.

We are aware that in most, if not all, cases of this description which are to be found in the books, there has been evidence to show how much of the price paid by the company was paid to the real vendor for the property he sold, and how much of this so-called purchase-money went into the pockets of the promoters; and we see the difficulty, and indeed the impossibility, of saying in this case how much of the £1,000,000 was paid for the mine itself. Further we assume that Park, as vendor, might have asked any price he pleased for the mine, and that the company would have had no right to recover from him or any one else the price the company paid, or any part of it, simply because the company had made a bad bargain, or because Park had made a large profit by the transaction. We do not in any way rely on the report of the committee of investigation, alleging that nearly £200,000 was paid for promotion-money, nor do we attach much importance to the defendant's uncandid answers to the charge made against him in the *Hour* newspaper. But we do consider it proved beyond all doubt that some part of the £1,000,000, viz., so much as was paid to the defendants, was not the price of the mine, but the price of something very different; and that the defendants knew this perfectly well when they obtained the 250 \*paid-up shares in question in this action. For the [410 reasons we have given we think that the verdict was right; that judgment ought not to be entered for the defendants; that there ought to be no new trial, and that the rule ought to be discharged with costs.

*Rule discharged with costs.*

Solicitors for plaintiffs: *F. W. Snell & Greenip.*

Solicitors for defendants: *Burton, Yeates & Hart.*

See 29 Eng. R., 199 note.

So long as a trust fund can be distinctly traced, the chancellor will fasten upon it, and apply it to the purpose to which it should have been applied,

unless the rights of innocent third parties have intervened: *Allen v. Russell*, 78 Ky., 105.

The right of following a fund fails when the means of ascertainment fails,

1879

Emma Silver Mining Co. v. Lewis.

as where it is mixed with the trustee's other funds and cannot be traced: People's Bank Appeal, 93 Penn. St. R., 197.

Mere failure to account for trust funds will not authorize a decree divesting title to land out of the trustee and vesting it in the beneficiary. There must be proof that the funds were invested in the land: Green v. Cates, 73 Mo., 115.

The mere fact that the owner of land uses trust funds in the improvement thereof, will not raise for the beneficiaries of such fund a resulting trust in the land so as to entitle them to the proceeds thereof to the exclusion of judgment creditors, subsequent to the making of the improvements: Cross's Appeal, 97 Penn. St. R., 471.

Where a county treasurer mingles trust funds received by him with the county moneys, such funds lose their identity, and if the treasurer pays a claim from the funds so commingled, persons who happen to be the losers by it cannot maintain an action against the one so paid, on the ground that part of his money must have gone in to make the fund for such payment: Gray v. Supervisors, etc., 14 N. Y. Week. Dig., 152, 26 Hun, 265.

Equity attaches to the relations of principal and agent such confidence and trust as precludes the latter from doing any act, or making any contract for his own benefit, in regard to the subject-matter of the agency; but this principle is confined to matters falling within the scope and limits of the agency and to the property embraced in the trust, and does not apply, except under peculiar circumstances, to acts, contracts, or property outside the trust: Rahl v. Union, etc., 5 Lea (Tenn.), 1.

A trustee can in no case, and under no circumstances, become the purchaser of the property he is intrusted to sell, so as to acquire a title which he can maintain against his *cestui que trust*: Creveling v. Fritts, 34 N. J. Eq., 134.

A board of health cannot employ one of its members to vaccinate pupils in a public school. An officer of a city cannot, as agent, contract with himself personally, buying what he is employed to sell, or hiring himself to do a service which he is employed to procure to be done: Fort Wayne v. Rosenthal, 75 Ind., 156.

A director of a corporation cannot

make for himself, or for his own benefit, a contract which will bind the company. The contract may be repudiated by the company at the instance of any stockholder: Guild v. Parker, 43 N. J. Law, 430.

The director of a corporation occupies a fiduciary position, and so is within the rule disenableing one intrusted with powers, to be exercised for the benefit of others, from dealing in his own behalf in respect to matters involving the trust.

The right of the corporation, or those claiming through it, to avoid any such dealings, does not depend upon the question whether the director was acting fraudulently or in good faith.

But an act of a director, claimed to be in hostility to this rule, in the absence of bad faith on his part, cannot be avoided without a restoration to him of what the corporation received. Where a director receives the property of the corporation as collateral security for a debt honestly due him, or a liability justly incurred, the rule has no application, as the payment of the debt or the discharge of the obligation is an essential prerequisite of an avoidance of the transaction; and this is so whether the pledge be taken for a present or a precedent debt.

The director of a railroad corporation cannot purchase its bonds below par, except on peril of avoidance by the courts upon application of the corporation.

But as he may be the lawful holder of such bonds, knowledge upon the part of a purchaser from him for value and in good faith of bonds so bought that he is a director, does not put such purchaser upon inquiry, or charge him with constructive notice of the defect in the title.

Where, however, bonds are taken from a director in pledge for a precedent debt, the pledgee takes no better title than his pledgor, and they are subject, in his hands, to any defect in the title of the latter: Duncomb v. N. Y., Vt. & N. R. R. Co., 84 N. Y., 190.

A director of a railway company, who was also a member of a mercantile firm, entered into a contract *qua* director with such firm for the supply of certain iron chairs at a fixed price.

Held, that such a contract, although it might be enforced at law, was illegal

in equity, upon general equitable principles, and would be set aside; and that no question could be raised as to the fairness or unfairness of a contract so entered into: *Aberdeen Railway Co. v. Blaikie*, 2 Eq. R., 1282.

Directors of a railroad company stand in the relation of trustees to the stockholders and creditors of the road, and are not allowed, in chancery, to deal with it at all, for their individual benefit; but their contracts for the sale of any part of its property to one of their number are not void at law; they are only voidable in equity at the instance of any one interested in the property of the road. Such sale cannot be avoided at law by a new company (which, by purchase of its property and reorganization, has succeeded the old) obtaining possession of the property sold, and refusing to deliver it to the purchaser: *L. R. & F. S. R. R. Co. v. Page*, 35 Ark., 304.

Declaration by a director of a company to recover a commission for having guaranteed a credit granted the company by their bankers; held, that the plaintiff was not entitled to recover, unless the declaration showed that he had been called upon to answer the guarantee, and also that he would not make any profit out of the transaction: *Hardy v. Phoenix Foundry Co.*, 7 Vict. L. R. (Law), 211.

A board of directors who have made a barter of the assets of their corporation for personal gain, cannot, by an act purporting to be an acceptance for the company, of an equivalent for such assets, conclude the stockholders or their representatives from showing that no equivalent was actually received: *Guild v. Parker*, 43 N. J. Law, 430.

A trustee, after he has made an actual sale in good faith of the trust property to a third person, may afterwards purchase it of such person, and acquire a good title to it: *Creveling v. Fritts*, 34 N. J. Eq., 134.

If a sale is shown to have been fair and honest when made, and that no fraudulent purpose then existed, it cannot be overthrown by subsequent acts or purposes: *Creveling v. Fritts*, 34 N. J. Eq., 134.

The rule that in transactions between an attorney and client the attorney is bound to establish, affirma-

tively, that it was made by the client with full knowledge of all material facts known to the attorney, and was free from all fraud on his part and misconception on the part of the client, and that a reasonable use was made by the attorney of the confidence reposed in him, applies where the attorney takes a benefit by way of a money legacy under a will prepared by him: *Post v. Mason*, 14 Weekly Dig., 7.

A solicitor prepared a will, by which a large part of the testator's property, real and personal, was given to himself. It appeared that the will was made according to instructions given by the testator, and that the solicitor had not obtained the gifts by any undue influence, misrepresentation, or suppression of fact. Held, reversing the decision of Vice-Chancellor STUART, that the gifts could not be impeached in equity.

*Semble*, the principles on which a court of equity acts as to contracts between solicitor and client and guardian and ward, are not to be applied to testamentary dispositions: *Hindson v. Weatherill*, 2 Eq. R., 733.

Purchasers of land, which has been fraudulently transferred to their grantor, must establish the good faith of their purchase, and it cannot be presumed: *Letson v. Reed*, 45 Mich., 27.

In setting up a plea of a *bona fide* purchase, the plea must state the deed of purchase, the date, parties and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea must show how the grantor acquired title. The title purchased must be apparently perfect, good at law, a vested estate in fee simple. It must be a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity: *Boone v. Chiles*, 10 Peters, 178.

N. and M., solicitors, were employed

1879

Sheffield Waterworks Company v. Wilkinson.

by K., as trustee, to defend a suit against the trust estate. Deeds of the trust property were in N. and M.'s hands for the general purposes of the trust. K. misappropriated funds of the trust estate, and died indebted to the estate in a sum largely exceeding N. and M.'s unpaid costs, and at no time was the trust estate indebted to him. Held, that N. and M. had no lien upon the deeds for their unpaid costs. Persons properly doing business for trustees as solicitors or otherwise, have generally no claim against the trust estate. No one can give a solicitor a lien upon deeds against a person from whom he could not himself withhold them: *Sawyers v. Kyte*, 1 Victorian Rep. (Eq.), 94.

Land was devised to trustees for an infant for life, and at her death, for her children. The trustees were empowered, during the infant's minority, to let for a term not exceeding twenty-one years at a rack rent, and not exceeding ninety-nine years upon a building or improving lease. There was a public house on the land let at the testator's

death for £240 a year. During the infant's minority the trustees allowed the tenant £215 for building a brick bar. The bar was an encroachment on the street, and had to be taken down; and the whole house was taken down and a new one built at a cost of about £1,300. The premises produced no rent during the rebuilding.

When rebuilt, they were let by the trustees to one of themselves.

Held, that the trustees were not entitled to credit as against the tenant for life for the sums expended in building the new bar, or in taking down and rebuilding the hotel, and should be charged with rent during the time of the rebuilding. That they should be charged with rent at a fair valuation during the trustee's occupation, without reference to the rent agreed upon. That in taking the accounts they should not be charged with the value of the premises as augmented by the expenditure disallowed them in account, but as if no such expenditure had been made: *Davis v. Kelleher*, 1 Vict. Rep. (Eq.), 175.

---

[4 Common Pleas Division, 410.]

March 18, 1879.

THE SHEFFIELD WATERWORKS COMPANY, *Appellants*;  
WILKINSON, *Respondent*.

SAME, *Appellants*; CORBIDGE, *Respondent*.

*Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17)—Right to cut off Supply of Water for Non-payment of Rates—Procedure for obtaining Restoration of Supply.*

A tenant of premises supplied by a company with water having failed to pay the water-rate, the company under the powers conferred upon them by s. 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), severed the communication with their main pipes. A subsequent tenant demanded a supply of water for the same premises, tendering to the company the current quarter's rate and the estimated expense of restoring the communication, but the company refused to supply the water until the arrears due from the former tenant were paid. A magistrate having convicted the company under s. 43 of the Waterworks Clauses Act for such refusal:

*Held*, that, although the company were not warranted in refusing to supply water to the incoming tenant until the arrears due to them as above stated were paid, they could not be made liable to the penalties imposed by s. 43 until he himself had restored the communication with their main pipes.

CASE stated by a police magistrate under 20 & 21 Vict. c. 43.

1. By an information laid on the 26th of November, 1878, Walter Wilkinson complained that, on the 9th of Novem-



ber, 1878, he being the owner of a dwelling house No. 12 Kaye Place, Barber Road, Sheffield, and then having laid communication pipes and done the necessary works, and tendered the water-rate payable in respect thereof, as required by law, did demand from the water company a sufficient supply of water for domestic purposes for the said dwelling house, and that the water company \*had [411] neglected and refused to give such supply, contrary to the statute. The company were thereupon summoned.

2. On the hearing it appeared that the annual value of the house did not exceed £10; that it was one of a group of houses; that by about October, 1877, the communication pipes for bringing the water from the company's main into the house were laid down to it with the rest of the group, under an arrangement nearly answering to a full carrying out of the provisions of ss. 44 and 47 of the Waterworks Clauses Act, 1847; and that, so long as the water-rates payable therefor should be duly paid, the occupier of the house was in the language of s. 44 entitled to have a sufficient supply of water for his domestic purposes.

3. At Lady Day, 1878, David Kaye was owner of the house in question, and as such was the owner liable in respect of it to the provisions of s. 72 of the Waterworks Clauses Act, 1847. The water-rate for the then past quarter, which ended on the 25th of March, was paid in accordance with an accustomed practice of the company.

4. When Midsummer, 1878, came, no payment of water-rate was made either for the then past quarter, or for the quarter then commencing, or for any other period.

5. On the 6th of August, 1878, Kaye filed a petition for liquidation in the county court, and one Pearson was appointed receiver under the Bankruptcy Act, 1869. It then appeared that the house in question (with eight others) had been mortgaged by Kaye to the Alliance Benefit Building Society by deed dated the 21st of June, 1878, under which the mortgagor was to remain in occupation of one of the other houses and a tenant of his in occupation of No. 12; but the mortgagees had power to enter and sell in the event of proceedings in liquidation taking place. The result was that the mortgagees intervened on or immediately after the 6th of August, made Pearson their agent, and gave the tenants notice to pay their rents to him. Meanwhile, the water-rate for the past quarter remained unpaid, and a portion of the then current quarter had run out, viz., from the 24th of June to the 6th of August. On the 7th of August, an officer of the company gave Kaye notice that, unless the water-rate

1879

Sheffield Waterworks Company v. Wilkinson.

was paid on or before the 9th, the supply would be cut off. 412] On the 14th of \*August, the respondent's solicitors wrote to the company warning them that they would be held responsible for any loss or damage which the mortgagees or the tenants might sustain if the water were cut off.

On the same day the company stopped the water from flowing into the house, by cutting the communication pipe, and wrote to the solicitors, as follows: "The water-rate in respect of Kaye's property is unpaid; and, as the company have under such circumstances a clear right to cut off the supply of water, I am at a loss to understand the meaning of the threats in your letter. If the water-rate for the quarter ending June 30th and a proportion of the current quarter up to the 6th of August, the date of Kaye's liquidation, which together amount to £3 8s. 4d., is paid at once, the water can be supplied again to the property on the usual order being given by the owners of it, whether they be mortgagees or the trustees in the liquidation. The cost of the injunction will of course have to be paid by those who order it." To this the appellant's solicitors replied,—"The water-rent is not a charge against the property, and the mortgagees are no more liable to pay Kaye's debt than a purchaser would have been liable. We should be obliged by your informing us under what act of Parliament you claim the right to make mortgagees pay their mortgagor's debts. We repeat that the mortgagees are ready to pay in advance, if you require it, the rent from the time they took possession." And on the same day the solicitors wrote again,—"Since writing our letter this morning, we are informed that the water has been cut off. We must require you to again connect it; and we shall pay whatever the costs may be, under protest." To this the secretary answered on the 16th,—"I did not say the water-rate was a charge upon the property, or that the mortgagees were liable to pay Kaye's debt. All I did say was, that the company has a clear right to cut off the water from property in respect of which the rate is payable, if it is not paid when due. This is so: but the company does not assert any right against the mortgagees: they and the other parties entitled must settle amongst themselves who is bound to make the payment. Until it is paid the company is entitled to stop the water from flowing into the premises; and in this case the right will be exercised."

413] \*6. On the 29th of September, 1878, a fresh quarter began, viz., from thence to the 25th of December. At Michaelmas no water-rate was paid or tendered by any one.

On the 6th of November the mortgagees sold the house (with other property) to Wilkinson, the respondent, and on the 9th the latter wrote to the company requesting them to re-connect the pipes. This the company refused to do till their claims were paid.

On the 12th of November, the solicitors again wrote to the company,—“If you require payment in advance, Mr. Wilkinson is prepared to pay for the cost of making the necessary connection, and also pay a quarter’s water-rent in advance in respect of the houses. Please inform us whether you require a formal tender to be made, in case you still refuse to give the supply, as we are instructed to take proceedings.” To this the company’s manager replied,—“Until the company’s claims have been met, I cannot give orders that the water shall flow into the premises. I shall not require you to make the formal tender named in your letter of the 12th instant.”

7. The water company from the 14th of August up to the time of the laying of the information on the 26th of November never laid the water on to the house again; and no one paid any water-rate for the quarter from Lady Day to Midsummer Day, or for any subsequent time.

8. Upon the hearing it was contended by the counsel for the appellants that, upon the above facts, Mr. Wilkinson was not entitled to have the water put on again, without paying the water company their claims for arrears of rates. It was contended by the advocate for the respondent that he was not bound to pay the arrears of rates, and that the complaint was properly made under s. 43 of the act.

9. The opinion of the magistrate was to the following effect: On looking into the Waterworks Clauses Act, 1847, I came to the conclusion that many provisions in it turn upon an intention that the water-rate shall either be paid in advance at the beginning of each quarter or be enforced and collected while it is current: and I thought that the provision of s. 74 as to stopping the water from flowing into the premises essentially rests upon this intention being borne in mind. This intention, I thought, is displayed by the \*latter part of s. 70 as to first payments of the water- [414 rates, by the first part of s. 70 as to subsequent full quarters, and by the provisions of s. 71 as to cases in which notice is given between two quarter days of intention to discontinue the use of the water, and cases in which a removal takes place between two quarter days. It seemed to me that, however advisable the accustomed practice of the Sheffield Waterworks Company may be for their own case,

it cannot alter the intention and meaning of the Waterworks Clauses Act, 1847, which was passed independently and several years before its provisions were adopted by the company in 1853. In connection with this intention that there should if possible be payment of the water-rate either in advance or during a current quarter, it seemed to me that there is an intention that the liability for each quarter's water-rate shall be a simply personal liability,—each quarter's rate attaching either to the occupier who is actually supplied with the water for which the rate is charged, or to the owner who is in his shoes at the time, and the slight exceptions, as to paying for a full quarter when a discontinuance or removal takes place, did not seem to me to interfere with this intention. The language of the first half of s. 68, with the general bearing of the act, appeared to me to intend that the liability shall be a simply personal one in cases within s. 68: and the language of s. 72, which makes the present case (house not exceeding £10 annual value) an exception to s. 68, seemed to me to intend that, if the liability is a simply personal one in cases within s. 68, it is to be equally so in cases within s. 72. I therefore thought that a water-rate accrued due does not attach to the house, so as to be a liability running with the land, nor at all attaches to assigns of it, whether they take through a mortgage or an outright transfer. As to s. 74 of the act, the recovering the amount of the rate from the person supplied with water seemed to me the principal remedy given to the company; and I thought the provision as to stopping the water from flowing into the premises was a further and lesser remedy added to the other. I thought that the two intentions above named must be attended to in dealing with both of these remedies of s. 74, and especially in dealing with the one as to cutting off the water. I thought 415] that this latter remedy at least \*is intended for use only against the actual defaulter; and that assigns of a house, whether taking title through a mortgage or a purchase, cannot have it enforced against them for the defaults of their assigns as to rates before their time. I was, indeed, inclined to go further and think it is intended for use against any one only while the quarter to which the rate belongs is still current; so that, if a person is in default for the rate of a quarter which is past, I was inclined to think that he may nevertheless insist on paying for and having a supply for the current quarter, in spite of his default, and though the company may proceed against him according to the principal remedy for the arrear they would be wrong if they stopped the supply of water for it,—much less, therefore,

as it seemed to me, can the supply be stopped for arrears of past quarters as against any other person than the actual defaulter, whether taking title through him or not.

Applying this reading of the Waterworks Clauses Act, 1847, to the information laid by Mr. Wilkinson, I arrived at the following results: This cause of complaint is laid as beginning on the 9th of November, that is, after the quarter from Michaelmas Day to Christmas Day had begun to run. At that time no water-rate for the quarter from Lady Day to Midsummer Day had been tendered or paid by any one; no water-rate for the quarter from Midsummer Day to Michaelmas Day had been paid by any one; and no water-rate for the then current quarter had been paid by any one. If this were all that had taken place, it seemed to me that, as soon as Mr. Wilkinson on November the 12th made the tender of the whole of the rate for the current quarter from Michaelmas Day to Christmas Day, he became entitled to be supplied with water for the rest of the current quarter, without paying the rates for either of the past quarters; and that, on the company neglecting or refusing to furnish him with the supply of water, his cause of complaint against them came within s. 43.

But, more than this had taken place; for, while the past quarter was current, the water company (assuming to act under s. 74) had stopped the water from flowing into the premises, so that the water was in a state of stoppage when Mr. Wilkinson came on the scene. This being so, I thought it was open to doubt whether at least the more proper course would not have been for him to have proceeded \*as if [416 no pipes, &c., had ever been laid down, that is, under ss. 44 and 45 of the act: but, on the whole, I thought that, as he had offered to pay the cost of re-connecting the communication-pipe which the company had cut off from the main, he was not wrong in complaining under s. 43.

10. Upon the above grounds the magistrate came to the decision that the waterworks company had incurred a penalty of £10 under s. 43 of the act, and had also forfeited under s. 43 the sum of 40s. to Mr. Wilkinson for each of the fourteen days between the 12th of November when the letter of that day was sent, and the 26th of November when the information was laid: and he accordingly ordered that the appellants should pay those sums (making together £38), and certain costs.

The question for the opinion of the court was, whether or not the decision was right in point of law.

March 14. The appeals were argued by *Cave*, Q.C. (*Cyril Dodd*, with him), for the appellants, and by *Tennant* for the respondents.

The contention on the part of the appellants was, that, the supply of water having been properly cut off under the authority conferred upon the company by s. 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), for non-payment of rates due from the then tenants, they were under no obligation to restore the connection, and the respondents were not entitled to be supplied with water until the arrears were paid and the pipes re-connected under the provisions for that purpose in ss. 44 and 48 respectively; and that it was no part of the duty of the company to restore the communication.

In Wilkinson's case the pipes had originally been laid by the company under s. 44, and the respondent was ready to pay the current quarter's rate (but not the arrears due from the former tenant of the premises) and the expense of re-connecting the communication pipe,—a formal tender being dispensed with.

In Corbidge's case the pipes had originally been laid down by the owner of the premises under s. 48, and the respondent had tendered the current quarter's rate, but had not proceeded to cause the communication to be restored.

417] \*For the respondents it was contended, that, upon tender of the rates payable for the current quarter, the company were bound to restore the communication and to supply the water, and were liable to the penalties imposed by s. 43 for their refusal to do so.

The arguments are fully stated and the several sections of the act referred to and commented upon in the judgment.

*Cur. adv. vult.*

March 18. BRAMWELL, L.J.: I have come to the conclusion that this conviction cannot be sustained. The grounds upon which I arrive at that conclusion require a considerable amount of statement. The information is founded on the 43d section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), which says that, "if, except when prevented as aforesaid (<sup>1</sup>), the undertakers neglect or refuse to furnish to any owner or occupier entitled under this or the special act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of £10, and shall also forfeit to every person having paid or ten-

(<sup>1</sup>) That is, "by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs," s. 42.

dered the rate the sum of 40s. for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply." The question is, whether the informant Wilkinson is a person who was entitled under the acts to receive a supply of water. In one sense the company have refused to furnish the supply, that is to say, they have not supplied the water. Whether that is a *refusal* under the statute may be to my mind a matter of some doubt, because, as matters stood when they were called upon to supply it, they could not supply it, by reason of the service-pipe having been severed. I will, however, treat it as a refusal, and deal with the question as being this,—was the respondent a person entitled under the act to receive a supply of water? Now, Mr. Cave made a very obvious remark, no doubt, but it is one which it will be as well to bear in mind, because it is really the key to the whole matter: it was this, that, if the respondent is a person entitled, he must be entitled under the act of Parliament, because \*no one can have a natural or in- [418] herent right to be supplied with water by this company. Now, the persons entitled to a supply are the persons described in ss. 44 and 48 respectively. I will begin with s. 44, which is introduced by these words, "And with respect to the communication pipes to be laid *by the undertakers*," and which enacts that "the undertakers shall, upon the request of the owner of any dwelling house in any street in which pipes shall have been laid down by them, the annual value of which house shall not exceed £10, or upon request of the occupier, with the consent in writing of the owner or reputed owner of any such house or of the agent of such owner, and upon payment or tender of the proportion of water-rate in respect of such house by this or the special act made payable in advance [s. 70] lay down communication pipes and other necessary works for the supply of such house with water for domestic or other purposes, and shall keep the same in repair, and thereupon the occupier of such house shall be entitled to have a sufficient supply of water for his domestic purposes from the undertakers." The section goes on to provide that the undertakers may charge for such pipes and works, in addition to the water-rate, such reasonable annual rent as shall be agreed or shall be settled as therein mentioned, &c. The next class of persons entitled to a supply are those described in s. 48, which is introduced by these words, "And with respect to communication pipes to be laid *by the inhabitants*," and which enacts that

1879

Sheffield Waterworks Company v. Wilkinson.

"Any owner or occupier of any dwelling house or part of a dwelling house within the limits of the special act, who shall wish to have water from the waterworks of the undertakers brought into his premises, and who shall have paid or tendered to the undertakers the portion of water-rate in respect of such premises by this or the special act directed to be paid in advance, may open the ground between the pipes of the undertakers and his premises, having first obtained the consent of the owners and occupiers of such ground, and lay any leaden or other pipes from such premises to communicate with the pipes of the undertakers, &c.; provided always that every such owner or occupier shall, before he begins to lay any such pipe, give to the undertakers fourteen days' notice of his intention to do so." Then, after a variety of details as to the mode of making such communication, \*as to the bore of the service-pipes, and as to the notice to be given by the proprietor before the removal of the same, &c., s. 53 enacts that "Every owner and occupier of any dwelling house or part of a dwelling house within the limits of the special act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate payable in respect thereof, according to the provisions of this and the special act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes." The respondents are persons within these sections: in Wilkinson's case, the communication pipes were laid down by the undertakers, under s. 44; in Corbidge's case they were laid down by the owners, under s. 48: and in both cases the rates were duly tendered, or a tender was dispensed with. If the matter had stood there, the respondents would have been entitled to a supply of water, and the appellants would have been liable to the penalties for improperly withholding a supply. But then comes s. 74, which enacts that, "if any person supplied with water by the undertakers, or liable as herein or in the special act provided to pay the water-rate, neglect to pay such water-rate at any of the said times of payment thereof,"—which was the case here,—“the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate *due from such person*, if less than £20, with the expenses of cutting off the water and costs of recovering the rate, in the same manner as any damages for the recovery of which no special provision is made are re-



coverable by this or the special act; or, if the rate so due amount to £20 or upwards, the undertakers may recover the same, with the expenses of cutting off the water, by action in any court of competent jurisdiction." Well, the undertakers did cut off the water from the respondent's premises, and consequently the communication contemplated by the 44th and 48th and following sections became severed, and the company were unable to supply water to the premises in question until that communication should be restored. I find nothing in the act of Parliament to compel the company to reannex the service-pipes to their main,—a thing which would be attended with an expense which they are not \*under any obligation to incur: and that seems [420 to me to dispose of the case.

Now, an argument which might be used, and which no doubt is a formidable one, is this,—if the opinion I am expressing is right, it follows that any occupier who omits to pay a quarter's rate, say of two or three shillings, may deprive his landlord of the right to a supply of water to his premises, because the company may avail themselves of their power under s. 74 to cut off the communication. If that be so, it is undoubtedly a hardship: but the answer which may be made to that argument, even if it were well founded, would be this,—It may be hard upon the owner of the house that he should be temporarily deprived of the supply of water through the default of his tenant; but it would be equally hard upon the undertakers, who have exercised a right conferred upon them by the statute, if they were bound at their own cost to restore the communication which they had rightfully severed. But, although it is not necessary to decide that, I really do not think that consequence follows, and for this reason: Take the case of a house of above the value of £10 per annum, where the service-pipe is laid down by the owner of the premises, if the communication has been severed, I see nothing in s. 48 to prevent his restoring it. Sect. 51 contemplates that the service-pipes may be removed by the persons who put them down and whose property they are. Suppose the house were burnt down, and not rebuilt for say ten years, the communication remaining all that time severed, what is there in s. 48 to prevent the owner's right to restore it at his own expense? So, where the service-pipe has been laid down by the undertakers, under s. 44, the owner of the house may, under s. 47, "pay off the amount then due to the undertakers in respect of the cost of providing and laying down such pipes and works, and all

rent to that time due in respect thereof, and thereupon such pipes and works shall become the property of such owner, and all further rent in respect *thereof* shall cease to accrue to the undertakers." If the owner has availed himself of the right to purchase the pipes under that section, he is placed in the same situation as an owner under s. 48 and the following sections, and would be able to make the communication himself. I cannot help thinking that this idea de-421] rives some \*countenance from s. 46, which provides that, "if the occupier for the time being of the house in which any such communication pipes or other works and engines shall have been laid down by the undertakers refuse to pay for a supply of water, or if such house be unoccupied for twelve months, the undertakers may demand from the owners thereof payment of the amount of the principal money invested by them in providing and laying down such communication pipes and other works and engines; and, if such owner, after ten days' notice given to him by the undertakers, neglect or refuse to pay such principal money, the undertakers may enter the house and remove such pipes and other works; and the balance of such purchase-money, after deducting the value of such pipes and other works, with all arrear of rent for such pipes and works, shall, in default of payment, be recovered with the costs incurred from the owner or from the occupier for the time being, in the same manner as water-rates are directed by this or the special act to be recovered." The result is this, that, where the pipes have been laid down by the undertakers, and the owner of the house has not availed himself of the option of purchasing them, the undertakers cannot at once proceed to cut off or remove the pipes, but must wait the prescribed time. Under these various sections, it seems to me that, where the communication has been severed, it is competent to the persons interested in the house to restore it by laying down fresh pipes or by re-connecting the existing pipe. I do not find anything in the act of Parliament to authorize the breaking up of the soil for this purpose; but it seems to me to follow as a necessary consequence from the general provisions of the statute.

The conclusion I have come to is this,—that the undertakers may cut off the communication under circumstances such as are disclosed in this case, and that the appellants were not bound to restore the communication which they had lawfully interrupted under the powers of the act. There is no hardship in this, because, as I have already intimated,

there is a power in the owner to restore the communication himself by laying down fresh pipes or re-connecting the existing ones. My judgment does not proceed upon this, that the appellants have a right to insist upon the communication \*with their main remaining severed, until their [422 claim for rates due from the preceding occupier is satisfied. I do not think they have such right. That was, no doubt, the notion upon which they acted: but in my opinion it is not sustainable. The learned magistrate who has stated this case has argued it extremely well; and I agree with him in thinking that it was not the intention of the Legislature that the undertakers should be at liberty to withhold the supply of water from the respondent's premises until the arrears due from some one else are paid. I also agree with him in thinking that ample provision is made for their security by enabling them to demand the rates in advance, without having what may be called something in the nature of a lien upon the property itself for by-gone rates. I do not, however, come to the conclusion I have done upon that ground: but I think there was no obligation on the appellants to supply water to the respondent's house until the communication was restored, and that they were not bound to restore it.

There is a slight distinction between the two cases. Wilkinson tendered to the company the expense of re-connecting the pipe,—at least he said he would be at the expense of restoring the communication, and the appellants' officer said, "You may consider that a tender, and we dispense with any formal tender." The appellants ought to have accepted that offer, because by doing so they would have got all that they were really entitled to or could enforce: but they were not bound to do it. There being no possibility of a supply of water being furnished whilst the communication was severed, I cannot say that the respondent was a person who was entitled to a supply or that the appellants were liable to penalties for withholding it. In Corbidge's case there was no tender of the expenses of restoring the communication, nor any dispensation.

It has taken me some time to express the opinion which I have formed, because the question involves a good many considerations, and is of some importance. It will be understood, I trust,—so far as my opinion is of any value,—that I do not hold that the undertakers have any lien for arrears of rates. If before they had cut off the supply, the amount of the current rate had been \*tendered to them, they [423

1879

Sheffield Waterworks Company v. Wilkinson.

would have had no right to cut it off, and would have been bound to supply the water notwithstanding there might have been anterior rates still due to them.

As to the costs,—If this proceeding had been adopted merely for the purpose of trying the question, and the respondents had been contented with a single penalty, the controversy would really have been so much for the benefit of both parties, that, seeing that the appellants were so substantially in the wrong in the sense I have mentioned, though right in point of law, I should have doubted whether the respondents ought to have been made to pay the costs of this appeal. But, as they have gone for substantial penalties,—£38 in the one case, and £30 in the other,—I think the appeals should be allowed with costs.

LOPES, J.: These two appeals raise questions of some importance and some difficulty under the Waterworks Clauses Act, 1847. The facts may be shortly stated thus: Wilkinson was the owner of a house under the annual value of £10. The house had belonged to one Kaye. Kaye mortgaged it; and in September, 1878, the mortgagees sold the premises to Wilkinson. At this time the water-rate for several quarters was in arrear; and on the 14th of August, 1878, the appellants, in exercise of the powers given to them under s. 74 of the Waterworks Clauses Act, 1847, cut off the supply of water to the premises, and the supply was so cut off when Wilkinson became the purchaser of the premises. On the 12th of November, Wilkinson tendered the then current quarter's rate, and offered to pay the expense of re-connecting the severed pipe. The appellants refused to furnish a supply of water until the arrears due from the former occupier were paid. Wilkinson summoned the appellants before a magistrate for this refusal, and they were convicted under s. 43 of the act, and the penalties appearing in the conviction were inflicted upon them. In Corbridge's case the premises were of more than the annual value of £10. One Biggs had occupied the house down to the 26th of September, 1878, when he filed his petition in bankruptcy. Corbridge was appointed receiver on the 27th, and lived in the house, and was accepted by the owner as his tenant. On the 23d of October further rates were in arrear, 424] and \*the company cut off the supply. On the 8th of November Corbridge tendered the current quarter's rate in advance; but the company refused to continue the supply. They were thereupon summoned and convicted.

Now, if these convictions are right, they can only be sus-

tained under ss. 43 and 74 of the act. I am of opinion that they cannot be sustained. The 70th section provides that "the rates shall be paid in advance by equal quarterly payments." This is a provision for the protection of the undertakers, and seems to show that the Legislature intended that the rate should be a personal liability, and should not attach to the property. I think, therefore, to use the words of the Lord Justice, that there is no lien in respect of any arrears of rates. Sect. 74 enacts that, if any person supplied with water neglect to pay the water-rate, the undertakers may stop the water from flowing into the premises, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit. Sect. 43 provides that, "if the undertakers neglect or refuse to furnish any owner or occupier entitled under this or the special act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of £10," and be subject to a further penalty of 40s. for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply. Now, the important question in this case is, what is the meaning of "any owner or occupier entitled under this or the special act to receive a supply of water?" Is it a person whose supply of water has been cut off for non-payment of rates? I do not think that is the meaning. I think that section refers to a case of improper refusal and neglect where the communication is intact and has not been interrupted by any misfeasance by the party claiming to be entitled. In such a case, it may not be unreasonable that the undertakers should be subjected to penalties for withholding the supply. It is not immaterial to consider what would be the effect of a different construction of the section. An occupier might neglect to pay, and, after the undertakers had availed themselves of their power under s. 74 to cut off the supply, might tender the rate and then call upon the undertakers to incur the expense of \*re-connecting it. It may be [425 that this construction of the act may impose some hardship upon the owner or occupier who has by no neglect or default of his own been deprived of the supply; because there are no means, at least no direct means, provided in the act by which he can compel a re-supply. That seems to have been overlooked when the act was passed. But the position of the occupier is not irremediable. He may begin *de novo*, as suggested by the Lord Justice. For these reasons, I agree

1878

Foster v. Wright.

in the conclusion at which he has arrived. The conviction must be quashed.

*Conviction quashed; leave to appeal in Wilkinson's case granted.*

Solicitors for appellants: *Pitman & Lane*, for R. Blacklock Smith, Sheffield.

Solicitor for respondents: *Higgin*, for Clegg & Sons, Sheffield.

See note to Parry v. Smith, *ante*, p. 567.

[4 Common Pleas Division, 488.]

July 8, 1878.

438]

\*FOSTER V. WRIGHT.

*Several Fishery—River—Gradual change of Course—Encroachment—Exclusive right to fish over new Bed of River.*

The plaintiff was lord of a manor held under grants giving him the right of fishery in all the waters of the manor, and, consequently, in a river running through it. Some manor land on one side of, and near but not adjoining, the river, was enfranchised and became the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there:

*Held*, that an action of trespass against him for so doing could be maintained by the plaintiff, who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on to the defendant's land.

MOTION for judgment (<sup>1</sup>).

Action to try the right of fishing in part of the river Lune.

The claim alleged that the plaintiff was the owner of the Camp House Farm abutting on the river, and of the whole bed of the river abutting on the farm; that he also claimed in the alternative a several fishery, and likewise in the alternative, a free fishery in that part of the river; that he also claimed the bed of the river and the said rights of fishing as lord of the honor and manor of Hornby, which comprised the river and the bed thereof; and that the defendant had committed divers trespasses by entering upon the bed of the river and fishing therein, and preventing the plaintiff from fishing therein.

The defence alleged (*inter alia*), that the defendant and those whose estate he had, were the owners of the Snabhouse

(<sup>1</sup>) This report was postponed pending an appeal. The case came before the Court of Appeal during the last sittings, but was there settled by the parties.

estate, abutting on the river, and that the grievances complained of consisted of acts of fishery and other acts done by the defendant in that part of the river lying between its shore on the Snabhouse estate (opposite the Camphouse Farm), and the middle of the bed of the river along the same part of the Snabhouse estate; the \*defendant denied [439 that the plaintiff was owner or possessed of that part of the bed of the river.

Issue.

At the trial before Brett, L.J., at the Lancashire Spring Assizes, 1878, it appeared that no facts were substantially disputed except as to a question of boundary, viz., the extent to which the river Lune had encroached upon the land of the defendant. Some encroachment was admitted, and the parties arranged that the question of boundary should thereafter be settled between them, and that the plaintiff should move for judgment upon the facts proved and admitted, of which those material were as follows.

The river Lune, which is neither tidal nor navigable, flows through the manor or honor of Hornby, in Yorkshire. From an inquisition post mortem taken in the thirteenth year of Edw. I, it appears that one Sir Geoffrey de Neville held the manor with the appurtenances, and that he "also held the fishery of all the waters of Hornby." The manor passed down into the possession of George Earl of Cardigan, who, in 1711, enfranchised some land in the township of Grassingham within the manor. This land, called Wood's Ayre, did not then abut on the river.

By the deed of enfranchisement the lord excepted and reserved from the grant of the premises, his seignorial rights and services, tithes, and compositions, and also all manner of free warrens. . . . Together also with free liberty of hunting, hawking, fishing and fowling in and upon the premises or any part thereof, at seasonable and convenient times of the year. In 1780, the manor was forfeited on the attainder of its lord, Colonel Charteris, but was re-granted, with free liberty of fishing in all the waters of the manor, and in 1783, came into the hands of Mr. John Marsden. His heir-at-law, after establishing his right to it in the action of *Tatham v. Wright* (1), sold it, and the purchaser afterwards sold it to the plaintiff, who is now the lord of the minor.

The enfranchised land, Wood's Ayre, in the township of Grassingham, came into possession of the defendant. It is adjacent to the part of the manor lands belonging to the

(1) 2 Russ. & My., 1; 1 A. & E. (Ex. Ch.), 8.

plaintiff and in the township of Tarleton. The boundry of the townships was also the boundry between the two properties.

440] \*Prior to 1838, the river Lune flowed wholly within these Tarleton lands of the plaintiff. It ran parallel to the defendant's land, but land belonging to the plaintiff was between the river and the boundary of the defendant's land.

From observations made and noted on a map by a steward of the defendant's predecessor in title, it appeared that between 1838 and June, 1843, the river had by invisible progress moved sideways towards the defendant's land and was wearing away the plaintiff's land which intervened. By November, 1843, it had moved further in the same direction, and it continued to do so until it encroached to some extent upon the land of the defendant, who, in 1853, stopped further encroachment by making an embankment. As a strip of his land now formed part of the river bed he claimed a right to go upon that part to catch salmon which came there, and in assertion of such right, he committed the acts alleged by the plaintiff to be trespasses.

June 24, 1878. *Herschell*, Q.C., and *Crompton*, for the plaintiff, moved for judgment: First, the lord of the manor has a several fishery which entitles him to maintain trespass for the acts of the defendant in going upon the bed of the river to fish. A several fishery may be held as a separate and distinct right, although exercised over the possessor's own soil. A several fishery *prima facie* imports ownership of the soil: *Marshall v. Ulleswater Steam Navigation Co.* (1). Secondly, he has a right to fish in all the waters of the manor wherever they flow in it, and the Lune is one of them. Even a sudden and violent change in its course would not have taken away that right. A gradual change such as has taken place here certainly would not disturb it. Most rivers change their channel from time to time, and much uncertainty, inconvenience, and litigation would arise if the right of fishery in them were subject to frequent alterations because of variation in the flow of the water. The right cannot be restricted to the waters as they ran when the grant was made, for it would be impossible to ascertain their exact course at that date. Any concurrent right would be hard to define and to exercise. Could it be said that when a stream moves side-  
441] ways one-tenth of its breadth the lord \*loses his right to fish in that tenth part of the stream which flows over a new bed? The lord of this manor has also a right of shoot-

(1) 3 B. & S., 732.



ing over all the lands, and if he enfranchised some, but reserved that right, he could undoubtedly shoot over the enfranchised lands, and even over the deserted bed of a river where, when water flowed in it he could not practically have exercised the right. So, by analogy, when the waters of Hornby, by change of channel, enable him to fish in places where he could not previously have fished, he can exercise his right of fishery there, even though without the manor. The defendant will rely on the *Mayor and Corporation of Carlisle v. Graham* <sup>(1)</sup>, deciding that a several fishery in a tidal river, the waters of which have permanently receded from one channel, and flow in another, cannot be followed from the old into the new channel. But the river there was tidal, and the right was to fish in a particular part of the Eden, which left that locality and flowed into the Goat, and the owners of the right sought to exercise it in the Goat, a different stream. But the Lune has not ceased to be one of the waters of Hornby because of the slight change of course, for notwithstanding the encroachment on the enfranchised land the river still runs within the manor. Suppose even no manor existed, and the plaintiff had a several right of fishery in the Lune, he would retain his right although the river has changed its course, inasmuch as the change has been gradual and imperceptible from day to day. "If a fresh river between the lands of two lords or owners do insensibly gain on one or the other side, it is held, 22 Ass. 93, that the proprietary continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds."—Hale, *De jure Maris*, cap. 1, p. 5. Of course the change becomes ultimately perceptible. But can it be said that when once it is perceived that the river has made for itself a partially new channel the right of fishery ceases?

[LORD COLERIDGE, C.J.: May not the true view be that the right does not cease, but cannot be exercised unless the stream returns to its old bed?]

The defendant contends that the right ceases as regards so much \*of the stream as passes over the new bed, [442 and in that part of the stream he claims an exclusive right of fishery. Thirdly, the deed of enfranchisement reserves the manorial right so does not aid him. [They argued as to the construction of the deed, and cited *Malcolmson v. O'Dea and Others* <sup>(2)</sup>, but this part of the argument eventually became immaterial.]

(1) Law Rep., 4 Ex., 361.

(2) 10 H. L. C., 593, at p. 619.

1878

Foster v. Wright.

*C. Russell, Q.C.*, and *R. S. Wright*, for the defendant: The first argument on behalf of the plaintiff is that by reason of the right of fishery the soil of the new bed of the river is his, and that the defendant has trespassed on it. But the defendant has not lost his property in that part of his enfranchised land now covered by part of the waters of the Lune. It is still his freehold land covered by water. There is little authority on the law applicable to the encroachment of rivers, *Callis on Sewers*, 51, cites 22 Lib. Ass., pl. 93; for the proposition that where the encroachment of a river was so gradual that if one had fixed his eye the whole day thereon it could not be perceived, the increase was got to the owner of the river. But *Callis* omits the important qualification which is in Lib. 22 Ass., pl. 93, viz., "if this increase of water has been so stealthy that no one can perceive it, nor be able to define the increase, inasmuch as the increase has been made by process of time; as in many years and not in one year or in one day, and if certain bounds are not put and found, whereby we can perceive these increases to have been hastily made by the force of the flood, then this takes away from one lord a part of his soil, whereby the soil of the other lord becomes increased on the other side of the water, in such (case of) hasty increase no one ought to lose his soil if the river be not an arm of the sea that he have not the water with his soil. And *quære*, albeit, that the soil is increased by an arm of the sea, shall he lose his soil. I think that he shall not."

[*LORD COLERIDGE, C.J.*: The last sentence probably has reference to the fact that, in the case of an arm of the sea, the adjacent landowner would not be entitled to the soil *ad medium filum*, inasmuch as the foreshore is the king's.]

Yes, the *Mayor of Carlisle v. Graham* <sup>(1)</sup> establishes that 443] \*the rights of fishing do not follow the river into its new course, though public rights of navigation may. Lib. 22 Ass., pl. 93, is authority for saying that as the encroachment of the Lune, although not visible to the eye of a man watching it for a day, can be ascertained by metes and bounds, the defendant has not lost property in the land encroached on: so also *Britton*, cap. 33, fo. lxxxvi (book 2, ch. 2, s. 7, *Nichol's translation*), *Bracton*, Lib. 2, fo. 96. True, *Abbott, C.J.*, in *Rex v. Lord Yarborough* <sup>(2)</sup>, seems to adopt the passage cited from *Callis on Sewers*, and to somewhat disregard the point as to metes and bounds. The question there was as to alluvial deposit, and arose between the Crown and the owner of land adjoining foreshore. There-

<sup>(1)</sup> Law Rep., 4 Ex., 361.

<sup>(2)</sup> 3 B. & C., 91.

fore different considerations presented themselves. But in *Attorney-General v. Chambers* (<sup>1</sup>), also a case of alluvium on the foreshore, the dispute was as to the time of medium high tide, and Lord Chelmsford, L.C., dealt with the question now before the court, saying, that Lord Tenterden's opinion in *Rex v. Lord Yarborough* (<sup>2</sup>), is "not in accordance with the great authority upon this subject, Lord Hale," and asked when the accretion can be exactly ascertained, and "although from day to day, or even from week to week, the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no existence in the particular case?"

Although, *prima facie*, the property in the river, so to speak, may be in the plaintiff, yet when it is shown by the positive evidence of metes and bounds that the river is not all in his land but in his neighbor's land, the presumption is rebutted, and the rights must be ascertained by reference to the metes and bounds. See per Pollock, B., in *Ford v. Lacey* (<sup>3</sup>); *De Jure Maris* (<sup>4</sup>). The soil encroached on still belongs to the defendant, and therefore he has committed no trespass in using it.

Secondly, the plaintiff asserts a right to fish in the Lune, wherever it may at any time run within certain limits. He must go so far as to contend that if it ran entirely through the defendant's land and outside the manor the right would not be lost. But no authority has been cited to support the proposition. *Prima facie* the right of several fishery is to be exercised in some defined locality. Of course the locality may be altered by agreement or prescription, but otherwise must be that as to which the right was originally given or reserved.

The *Mayor, &c., of Carlisle v. Graham* (<sup>5</sup>) is a case in point for the defendant. There the diversion of the river from one course to another was gradual, and it was held that although the public rights followed the stream, the private right of a several fishery did not. There is no distinction in principle between that case and the one now before the court. That the river was tidal does not affect the question here, which arises between private individuals. Neither Kelly, C.B., nor Bramwell, nor Channell, B.B., in their judgments suggest that where the deviation of the stream can be exactly ascertained, the owner of a several fishery has a right to follow it into the new channel.

(<sup>1</sup>) 4 De G. & J., 55, at p. 71.

(<sup>2</sup>) 30 L. J. (Ex.), 351, at p. 354.

(<sup>3</sup>) 3 B. & C., 91.

(<sup>4</sup>) Harg. L. T., pp. 5, 6.

(<sup>5</sup>) Law Rep., 4 Ex., 861.

Thirdly, even if he might in some cases have such right to follow the stream, he could not follow it into the distinct freehold of another man to which it did not apply at the time of its creation.

Lastly, when the land now belonging to the defendant was enfranchised, it ceased altogether to be parcel of the manor of Hornby, and could no longer for any purpose be deemed to be within it. His predecessor in title acquired a freehold and not a freehold *sub modo* as the plaintiff contends, for that would be contrary to the statute *Quia Emptores*.

[They cited *Sowerby v. Smith* ('); *Bradshaw v. Lawson* ('); *Bailey v. Stephens* ('); *Wickham v. Hawker* ('); *Forman and Bohan's Case* ('); *Overseers of Hilton v. Overseers of Bowes* (').]

*Crompton* in reply: The *Mayor of Carlisle v. Graham* (') is distinguishable from the present case. There were two channels of the Eden. A right to fish in one might well not extend to the other. The river for a space changed its identity. The Crown had no right in the land through which the Goat passed, and could not have granted a fishery 445] there. Here the right is to fish \*in all the waters of Hornby. The Lune is one of them. It has not lost its identity by moving a little sideways as perhaps all the waters have done since the creation of the right. Can it be said that the right is therefore lost in all of them? The original intention of the grantor surely was not to confine the right in the lord of the manor and his successors to a right of fishing in the streams exactly as they ran at the time of the grant.

*Cur. adv. vult.*

July 3. LINDLEY, J.: The plaintiff in this case is lord of the manor of Hornby, and claims the exclusive right to fish in the river Lune between two points where that river is neither tidal nor navigable; and before the enfranchisement hereafter mentioned the river between those points was locally situate within the manor of Hornby.

This manor formerly belonged to the Crown. In the reign of Edward I, it was granted, with the right to fish in all the waters of the manor; and it remained in private hands for several centuries. In the year 1711, certain lands held of the manor, but not abutting on the river, were en-

(<sup>1</sup>) Law Rep., 8 C. P., 514; 9 C. P., 524.

(<sup>4</sup>) 7 M. & W., 63.

(<sup>2</sup>) 4 T. R., 443.

(<sup>5</sup>) Leon., 13.

(<sup>3</sup>) 12 C. B. (N.S.), 91.

(<sup>6</sup>) Law Rep., 1 Q. B., 350.

(<sup>7</sup>) Law Rep., 4 Ex., 361.

franchised, and these lands now belong to the defendant. After this enfranchisement the manor became forfeited to the Crown; but it was re-granted, with the free liberty of fishing in all its waters, to the predecessors in title of the plaintiff.

From the earliest times, the lands adjoining the river on both sides of it belonged to the lord; and such was the case both when the defendant's lands were enfranchised and when the manor was re-granted by the Crown as above mentioned. In other words, until comparatively modern times, the river did not abut on the lands of the defendant. Neither when the defendant's lands were enfranchised nor when the manor was re-granted out did any part of the river either abut on or flow through the defendant's lands. Under these circumstances, I am unable to see that the deed of enfranchisement has any bearing on the case. That deed reserved to the lord whatever rights of fishing he had in any water flowing through or bounding the lands enfranchised; but it did no more, \*and at the date of the enfranchisement [446 the Lune was not one of such waters: neither did the re-grant from the Crown confer upon the grantee of the manor any right to fish in the river as distinguished from any other waters of the manor.

The counsel for the defendant suggested that the terms of the new grant did not confer on the grantee any right of fishery, except as incidental to the ownership of the land on the banks and under the river: but it was conceded that as the river was then situate the grantee from the Crown acquired such ownership; and, in the view which I take of this case, it is not material to determine whether the grantee acquired his exclusive right to fish in the river; as an incident to the ownership of the bed of the river, or whether he acquired an exclusive right to fish independently of such ownership.

Since the re-grant of the manor, the course of the river between the points above referred to has gradually changed: its bed has gradually approached nearer and nearer to the defendant's land; and now some portion of that land has become part of the river bed. This part can still be identified, and its boundary can be ascertained. The question we have to determine is, whether the plaintiff's exclusive right of fishing extends over so much of the water as flows over land which can be identified as formerly part of the defendant's property.

I am of opinion that it does. The change of the bed of

the river has been gradual ; and, although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before. Under these circumstances, I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner.

Gradual accretions of land from water belong to the owner of the land gradually added to, *Rex v. Yarborough* ('); and, conversely, land gradually incroached upon by water, ceases to belong to the former owner : *In re Hull and Selby Ry. Co.* (\*). The law on this subject is based upon the im-447] possibility of identifying from \*day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shows this to be the case. Our own law may be traced back through, Blackstone ('), Hale ('), Britton ('), Fleta ('), and Bracton ('), to the Institutes of Justinian ('), from which Bracton evidently took his exposition of the subject. Indeed, the general doctrine, and its application to non-tidal and non-navigable rivers in cases where the old boundaries are not known, was scarcely contested by the counsel for the defendant, and is well settled : see the authorities above cited. But it was contended that the doctrine does not apply to such rivers where the boundaries are not lost : and passages in Britton ('), in the Year Books ("), and in Hale, *De Jure Maris* (") were referred to in support of this view : *Ford v. Lacy* (") was also relied upon in support of this distinction. Britton lays down as a general rule that gradual incroachments of a river enure to the benefit of the owner of the bed of the river : but he qualifies this doctrine by adding, "if certain boundaries are not found." The same qualification is found in 22 Ap., pl. 93, which case is referred to in Hale, *ubi supra*. But, curiously enough, this qualification is omitted by Callis in his statement of the same case ; see Callis, p. 51 : and, on its being brought to the attention of the court in *In re Hull and Selby Ry. Co.* (\*), the court declined to recognize it, and treated it as inconsistent with the principle on which the law of accretion rests. Lord Tenter-

(') 3 B. & C., 91 ; 5 Bing., 163.

(\*) 5 M. & W., 327.

(\*) Vol. ii, c. 16, pp. 261, 262.

(\*) De Jure Maris, cc. 1, 6.

(\*) Book ii, c. 2.

(\*) Book iii, c. 2, §§ 6, &c.

(') Book ii, c. 2.

(\*) Inst. ii, 1, 20.

(\*) Ubi supra.

(10) 22 Ass., p. 106, pl. 93.

(11) Book i, c. 1, citing 22 Ass., pl. 93.

(12) 7 H. & N., 151.

den's observations in *Rex v. Yarborough* <sup>(1)</sup> are also in accordance with this view; and, although Lord Chelmsford in *Attorney General v. Chambers* <sup>(2)</sup> doubted whether, where the old boundaries could be ascertained, the doctrine of accretion could be applied, he did not overrule the decision of *In re Hull and Selby Ry. Co.* <sup>(3)</sup>, which decided the point so far as encroachments by the sea are concerned.

\*Upon such a question as this I am wholly unable [448 to see any difference between tidal and non-tidal or navigable or non-navigable rivers: and Lord Hale himself says there is no difference in this respect between the sea and its arms and other waters: *De Jure Maris*, p. 6. The question does not depend on any doctrine peculiar to the royal prerogative, but on the more general reasons to which I have alluded above. In *Ford v. Lacey* <sup>(4)</sup>, the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership since the bed of the river had changed, than by reference to the doctrine of gradual accretion, and I do not regard that case as throwing any real light on the question I am considering.

Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river bed, I am of opinion that the plaintiff has that right; for, if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title.

But, supposing the plaintiff's right of fishing not to have been the consequence of his ownership of the soil,—supposing him to have had only a right to fish in the Lune,—I am of opinion that he has the same right of fishing in the river in its present bed as he had of fishing in the river in its old bed. I am wholly unable to see upon what principle a change in the course of a river, so gradual that it cannot be perceived until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose: nor is there any authority for holding them to be affected thereby. The *Mayor of Carlisle v. Graham* <sup>(5)</sup> is no such authority; for, in that case the

<sup>(1)</sup> 3 B. & C., 106.

<sup>(2)</sup> 4 De G. & J., 69-71.

<sup>(3)</sup> 5 M. & W., 327.

<sup>(4)</sup> 7 H. & N., 151.

<sup>(5)</sup> Law Rep., 4 Ex., 361.

old and the new beds of the river existed as two distinct beds; the new bed was not, as here, formed by the old one gradually shifting its place: then, the water gradually left the old bed, and followed an entirely new course always 449] distinguishable from the old; whilst \*here, there has been and is only one bed, and its change of place has only become perceptible after the lapse of years. The physical changes are totally different in the two cases.

Whether, therefore, the exclusive right of the plaintiff to fish in the river in question is an incident to his ownership of the soil or is independent thereof, I am of opinion that he is still entitled to such exclusive right in the river as it now exists, and as it will exist if it continues gradually to change its course; and consequently I am of opinion that judgment ought to be entered for the plaintiff.

LORD COLERIDGE, C.J.: I have had the advantage of reading the judgment prepared by my Brother Lindley, and I entirely concur in the result at which he has arrived. Nor should I add anything, but that I am not quite satisfied to base my conclusion so much as he does upon the proposition that the grant of the fishery, in such terms as are used in the two grants in this case, carries with it the right of the soil, and that the soil therefore of the river Lune as it varies gradually from time to time passes irrespective of the *medium filum* to the plaintiff. I do not say that it does not, but I am not satisfied that it does. If the whole soil over which the river Lune flowed passed by the first grant, and, after the death of Colonel Charteris, by the second to the predecessor in title of the plaintiff, I think the consequence as to gradual accretion, which my Brother Lindley draws from that premiss, does in legal reasoning follow from it. But I confess I somewhat doubt the premiss. The safer ground appears to me to be that the language as to the fishery in both the earlier and the later grants conveys what it expresses, a right to take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, i.e., as I understand the phrase, a right to take fish in *alieno solo*, and to exclude the owner of the soil from the right of taking fish himself; and such a fishery I think would follow the slow and gradual changes of a river, such as the changes of the Lune in this case are proved or admitted to have been.

I agree, for the reasons given by my Brother Lindley, that 450] the \*case of *Mayor of Carlisle v. Graham* (1) is dis-

(1) Law Rep., 4 Ex. 361.



tinguishable from the case before us; and upon these grounds I concur in thinking that our judgment should be for the plaintiff.

*Judgment for the plaintiff.*

Solicitors for plaintiff: *Speechly, Mumford & Co.*, for George E. Mumford, Bradford.

Solicitors for defendant: *Tahourdins & Hargreaves*, for Johnson & Lilly, Lancaster.

As to rights under accretion, alluvion, see 11 Eng. R., 118 note; 14 id., 386 note; 13 Cent. L. J., 1.

**Canada, Upper:** Standley v. Perry, 2 U. C. App. R., 195, 3 Can. Sup. Court, 356, reversing 23 Grant, 507.

**Illinois:** Chicago, etc., v. Kinzie, 93 Ills., 416; Bristol v. Carroll Co., 95 id., 84; Lombard v. Kinzie, 73 id., 446; Cobb v. La Valle, 89 id., 331.

**Maryland:** Baltimore, etc., v. Chase, 43 Md., 23.

**Missouri:** Lamme v. Busse, 70 Mo., 463.

**New York:** Murphy v. Norton, 61 How. Pr., 197.

**Nova Scotia:** Lhey v. McHeffey, 1 Nova Scotia Dec., 350.

**Oregon:** Minton v. Delaney, 7 Am. Law Rec., 746, 7 Oregon, 337.

**Pennsylvania:** Magraw v. Hallman, 33 Leg. Int., 192, 23 Pittsb. Leg. Jour., 113; Wainwright v. McCullough, 63 Penn. St. R., 66; Poor v. McClure, 77 id., 214; Allegheny v. Moorhead, 80 id., 118.

**Tennessee:** Moss v. Gibbs, 10 Heisk., 283; McClure v. James, 7 Lea, 98.

**Vermont:** Eddy v. St. Mars, 53 Verm., 462.

**Wisconsin:** Boorman v. Sunnucks, 42 Wisc., 233; Diedrich v. Northwestern, etc., 42 id., 243; Delaplaine v. Chicago, etc., Id., 214; S. C., 24 Am., 294.

[4 Common Pleas Division, 450.]

May 14, 1879.

[IN THE COURT OF APPEAL.]

LONG V. MILLAR.

*Statute of Frauds, s. 4—Vendors and Purchasers—Contract for Sale of Land—Receipt for Deposit signed by Vendor.*

The defendant, an estate agent, contracted to sell land to the plaintiff, who paid a deposit. The defendant signed a receipt in his own name for the deposit, and the plaintiff signed an agreement containing the terms of the purchase. The owner of the land refused to complete the purchase, and the plaintiff sued the defendant for damages for breach of the contract to sell. At the trial the jury found that the defendant sold as principal:

*Held*, that the defendant was personally liable, and that the agreement and receipt taken together formed a sufficient contract to satisfy the Statute of Frauds, s. 4.

**ACTION** to recover damages for breach of contract to sell land.

At the trial before Manisty, J., during the Easter Sittings in Middlesex, 1878, the following facts were proved:

The defendant was an estate agent, and was employed by one Goddard to sell three plots of land at Hammersmith for the sum of £310. Afterwards Goddard spent certain sums of

1879

Long v. Millar.

money in respect of the property, and became unwilling to sell it for less than £450, but of this change in Goddard's intentions the defendant was ignorant. The plaintiff agreed with the defendant to buy the property for £310, and to pay a deposit of £31 in respect of the purchase. The plaintiff signed the following document :

“21st September, 1877.

“I hereby agree to purchase the three plots (40 feet frontage) of freehold land in Rickford Street, Hammersmith, for 451] the sum of \*three hundred and ten pounds, and I agree to pay as a deposit and in part payment of the aforesaid purchase-money the sum of thirty-one pounds, and to complete the purchase and pay the balance of the purchase-money on or before the 5th day of October next.

£310 0 0 purchase-money  
31 0 0 deposit

£279 0 0 balance.

GEORGE LONG.”

The defendant signed a receipt for the deposit paid by the plaintiff in the following form :

“21st September, 1877.

“Received of Mr. George Long the sum of thirty-one pounds as a deposit on the purchase of three plots of land at Hammersmith.

£31 0 0.

CHAS. W. MILLAR.”

Goddard, however, refused to complete the purchase for the sum of £310, and required £450 as the price of the plots of land. The defendant communicated these terms to the plaintiff, and offered to return the deposit, but the plaintiff insisted upon having the plots of land at the price of £310, and after some correspondence the present action was commenced. The defendant paid into court the sum of £31.

The jury found, first, that the defendant sold absolutely; secondly, that he sold as principal; thirdly, that he represented that he had authority to sell for £310; fourthly, that he actually had authority; and they assessed the damages at £70. Upon these findings Manisty, J., gave judgment for the plaintiff.

The Common Pleas Division ordered a new trial, on the ground that the second finding of the jury was against the weight of evidence.

The plaintiff appealed against the order of the Common Pleas Division.

The defendant appealed from the judgment of Manisty, J.

May 8, 9. *Holl*, Q.C., and *G. Sills*, for the defendant: Even upon the facts found by the jury the judgment of Manisty, J., cannot be supported. The contract relied upon by the plaintiff is \*for the sale of an interest in land, [452 and it was not put into writing so as to satisfy the provisions of the Statute of Frauds. The only document signed by the defendant was the receipt; and even if the receipt and agreement signed by the plaintiff be read together, the name of the vendor is not disclosed. If the document signed by the defendant had been an agreement and not a receipt, the result might have been different. No price is mentioned in the receipt, only the amount of his deposit.

[BRAMWELL, L.J.: Suppose that the receipt signed by the defendant had been written at the foot of the agreement signed by the plaintiff, surely that would have been sufficient. Is it not a general rule that the contract is valid, where several documents exist which can be connected together without the aid of verbal evidence?]

This case resembles *Boydell v. Drummond* (1), which shows that in order to constitute a valid contract where several documents exist, they must refer to one another, so that verbal evidence is only necessary to identify the documents forming the contract. In the present case the receipt does not necessarily refer to the agreement signed by the plaintiff. It was quite possible that the plots of land mentioned in the receipt might belong to different persons; it is not sufficient if it is left in doubt to what the document signed by the party to be charged refers; and upon this ground *Ridgway v. Wharton* (2) is distinguishable. A document is not binding which does not contain the contract intended to be concluded; *Smith v. Webster* (3) or contains only some of the terms arrived at: *Rishton v. Whatmore* (4). The omission of the vendor's name is a fatal objection: *Williams v. Jordan* (5).

[BRAMWELL, L.J.: Upon these findings it must be taken that the defendant was the vendor.]

The defendant when he signed the receipt did not intend to authenticate the contract, and therefore he is not bound: *Caton v. Caton* (6). The receipt does not state the name of the defendant as vendor, *Vandenbergh v. Spooner* (7); and it does not \*contain any words showing that the de- [453 fendant intended to enter into a contract: *Eley v. Positive*

(1) 11 East, 142.

(2) 6 H. L. C., 238; 27 L. J. (Ch.), 46.

(3) 3 Ch. D., 49; 17 Eng. Rep., 789.

(4) 8 Ch. D., 467; 25 Eng. Rep., 430.

(5) 6 Ch. D., 517; 23 Eng. Rep., 116.

(6) Law Rep., 2 H. L. C., 127.

(7) Law Rep., 1 Ex., 816.

*Assurance Co.* ('). The verdict was against the weight of evidence, and cannot be upheld.

*Francis Turner*, and *A. G. M. McIntyre*, for the plaintiff: There was a valid contract within the Statute of Frauds, s. 4. If it can be gathered from the documents that a contract had been entered into, even a refusal in writing to perform it may be a sufficient compliance with the provisions of the statute: *Bailey v. Sweeting* ('). The question was whether there was evidence to go to the jury that the defendant was a principal. His signature to the receipt is evidence that he was a principal, and he is bound by the consequences of his own act. Although verbal evidence cannot be admitted to discharge a person whom the written contract declares to be liable, yet it may always be admitted to charge a person whose liability does not appear upon the face of the contract: *Higgins v. Senior* ('); *Jones v. Little-dale* ('). The principle of *Ridgway v. Wharton* (') and of *Allen v. Bennet* ('), ought to be applied to the present case. In *Calder v. Dobell* (') it was held that evidence might be given to show that the defendant was the real principal, although he had declined to allow his name to appear in the transaction; and *Southwell v. Bowditch* (') is distinguishable because it appeared upon the face of the document that the defendant was acting as agent. *Baumann v. James* (') is in point, and *Jones v. Victoria Graving Dock Co.* (') shows that, provided the signature be affixed for authenticating the document it is immaterial to consider why it has been affixed.

The findings of the jury may be read so as to be consistent, if the fourth be omitted, and then the defendant is found to have sold as principal, or at least to have represented that he had authority to sell for £310. The order for a new trial ought to have been discharged by the Common Pleas Division.

*Holl*, Q.C., replied.

*Cur. adv. vult.*

May 14. The following judgments were delivered:

BRAMWELL, L.J.: The first question to be considered is, whether there is a contract valid according to the provisions of the Statute of Frauds, s. 4. I think that, subject to the point which has been raised as to the omission of the ven-

(1) 1 Ex. D., 88; 16 Eng. R., 544.

(2) 6 H. L. C., 238; 27 L. J. (Ch.), 46.

(3) 9 C. B. (N.S.), 843; 30 L. J. (C.P.), 150.

(4) 3 Taunt., 169.

(5) 8 M. & W., 834.

(6) Law Rep., 6 C. P., 486.

(7) 6 A. & E., 486.

(8) 1 C. P. D., 374; 17 Eng. R., 324.

(9) Law Rep., 3 Ch., 508.

(10) 2 Q. B. D., 314; 21 Eng. R., 124.

dor's name from the agreement signed by the plaintiff and the receipt, there is a sufficient memorandum, and it appears to me that *Ridgway v. Wharton* (') and *Baumann v. James* (") are in point, and are decisive. The plaintiff has signed a document containing all the terms necessary to constitute a binding agreement, so that if he committed a breach of it he would be liable to an action for damages, or to a suit for specific performance. But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word "purchase," which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence. The facts in the present case fall within the principle of *Ridgway v. Wharton* ('). With reference to that decision Page Wood, L.J., in *Baumann v. James* ("), made the following remarks: "In that case 'instructions' were referred to. Now, instructions might be either by parol or in writing; but it was held that it might be shown by parol evidence that instructions had been given in writing, and that there had been no other instructions than the written document which was produced." I may further illustrate my view by putting the following case: suppose that A. writes to B. saying that he will give £1,000 for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return "I accept your offer." In that case there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B. is that made by A. without infringing the Statute of Frauds, s. 4, which requires a note or memorandum in writing. It was objected that the defendant was \*not [455 mentioned as vendor in either the agreement signed by the plaintiff or the receipt. As to this the defendant seems to me to be in a dilemma upon the findings of the jury, and we are bound to take them as conclusive so far as the appeal from the judgment of Manisty, J., is concerned. The defendant either was or was not the vendor; if he was, he has signed the receipt in his own name, and has made himself a party to the contract; if he was not, the jury have found

(') 6 H. L. C., 238; 27 L. J. (Ch.), 46.

(\*) Law Rep., 3 Ch., 508.

(\*) Law Rep., 3 Ch., 508, at p. 511.

that he represented himself as principal, and he would be liable for that misrepresentation.

As to the question whether there should be a new trial, I am of opinion that we cannot mould the findings and enter judgment for the defendant. There was some evidence of his liability, and I cannot say the question can be withdrawn from the consideration of the jury. It is quite another matter whether they ought to find in the plaintiff's favor.

I think that both appeals must be dismissed.

BAGGALLAY, L.J.: I am of the same opinion. It is impossible to hold that the receipt signed by the defendant is sufficient if taken by itself; it does not mention the price, but merely states that the sum of £31 is "a deposit on the purchase of three plots of land;" it does not state, at least in express terms, who are the vendor and the vendee. I agree that, subject to the question of the omission of the vendor's name, the document signed by the plaintiff would be sufficient to charge him. Out of these materials can a valid memorandum in writing be framed? I think it can. The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence. I think that in the present case by the words "purchase of three plots of land" the receipt sufficiently refers to the document signed by the plaintiff. Therefore the contract seems to me to be complete.

As to the appeal from the order for a new trial, I need only say that I agree with the Common Pleas Division that the findings of the jury upon the first trial were unsatisfactory.

THESIGER, L.J.: The first question is whether there is a sufficient reference in the receipt signed by the defendant to 456] allow us to \*connect it with the document signed by the plaintiff. When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument signed by the party to be charged that reference is made to another document; and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgway v. Wharton* (<sup>1</sup>); there "instructions" were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of

(<sup>1</sup>) 6 H. L. C., 238; 27 L. J. (Ch.), 46.

interpretation is merely a particular application of the doctrine as to latent ambiguity. Although parol evidence may be given to identify the document intended to be referred to, it must be clear that the words of the document signed by the party to be charged will extend to the document sought to be identified. In the present case the difficulty is whether there is a sufficient reference in the receipt to the document signed by the plaintiff. This document is somewhat informal, and does not contain such language as we should expect a lawyer to use; nevertheless, it contains all the terms necessary to create a valid contract except the name of the vendor; and the receipt contains the word "purchase," which must refer to the purchase of the plots of land mentioned in the document signed by the plaintiff; if we read the two instruments together, we shall not be unduly straining the law by holding that the two, taken together, form a complete contract; our decision will not go beyond the decisions in *Allen v. Bennet* <sup>(1)</sup> and in *Baumann v. James* <sup>(2)</sup>. If the two documents can be connected together, the objection fails that no vendor is named. These documents were meant to be exchanged between the parties; the one was drawn up with the intention that it should operate as a complete agreement; the other contained an acknowledgment of the payment of the deposit; they were respectively signed by the parties, both of whom, it must be taken on the findings of the jury, intended to bind themselves personally. The documents were meant to be read and compared with one another, and I think [457] them sufficient to constitute a contract.

The only ground remaining to be considered is whether there should be a new trial. I think that although the defendant was an estate agent, there is some ground for saying that he intended to bind himself personally; therefore we cannot say that the findings were so utterly wrong as to enable us to enter judgment for him. There must be a new trial.

*Appeals dismissed.*

Solicitors for plaintiff: *Paterson, Sons & Garner.*

Solicitors for defendant: *Dod & Longstaffe.*

<sup>(1)</sup> 3 Taunt., 167.

<sup>(2)</sup> Law Rep., 3 Ch., 508.

See 29 Eng. R., 567 note.

Where one executed a lease as treasurer of a voluntary association without any authority from his associates, he is personally liable: *Bartholomew v. Kaufmann*, 47 N. Y. Super. Ct. R., 552.

In the case of a society formed for no purpose of gain, the liability of members of the committee for a debt incurred on behalf of the society, resolves itself into a question of agency, or authority given by each of them. All

1879

Long v. Millar.

members authorizing any officer of the society to overdraw upon the account of the society at its bankers, are liable for future further overdrafts until they revoke such authority. Members, also, who have notice of the existence of an overdraft, whether by the appearance in the society's accounts of a charge of interest by its banker or otherwise, and who do not protest or actually dissent, are also liable: *English Scottish, etc.*, *v. Adcock*, 7 Vict. L. Rep. (Law), 157.

Where one acts as agent of another in the execution of an instrument *under seal*, and does not mean to bind himself personally, he must execute it in the name of his principal, and state the name of the principal only, in the body of the instrument: Therefore it was held, that a bond in which "I promise to pay to the order, etc., witness my hand and seal, signed by H. S. L. (seal) for C., president of a company," imposed a personal liability upon L.: *Bryson v. Lucas*, 84 N. C., 680.

Where a private agent does not attempt in a sealed instrument to bind his principal and in terms imposes the obligation on himself, the rule is, that he incurs by such act a personal liability, although he describes himself as agent.

The obligatory clause of a bond bound the defendants, trustees, etc., of a church, their successors and assigns, to pay to the plaintiff a certain sum, to which payment the obligors bound themselves and each of them, their heirs, executors and administrators, jointly and severally, the condition being that said obligors, "trustees as aforesaid, their successors and assigns," should pay, etc. Held, that this was the personal bond of the individuals named, and not of the corporation: *Dayton v. Warne*, 43 N. J. L. R., 659.

Upon a joint and several promissory note by the directors of a mining company, "for value received on account of the company," not describing themselves as directors of the company, such directors are personally liable: *McMullen v. O'Connor*, 5 Wyatt, Webb & A'Beckett (Law), 200.

One who signs a contract, affixing the word "agent" to his signature, the contract not disclosing any other person as principal, is *prima facie* liable upon it; but he may relieve himself by proof that he acted for and intended

to bind another, for whom he was agent, and that when the contract was executed it was so understood and intended between him and the other party, followed and applied. An agent intrusted with personal property to sell, may give out to whom he offers it a reasonable opportunity to try the articles, and make a contract to take effect as a sale if it prove satisfactory: *Deering v. Thom*, 12 Northwestern Rep'r, 350, approving *Bingham v. Stewart*, 13 Minn., 106, 14 id., 214, and *Pratt v. Beaupre*, 13 id., 187.

On a bill of exchange addressed "To the President Midland Railway of Canada, accepted," "For the Midland Railway of Canada, accepted; H. Read, Secretary, Geo. A. Cox, President," they being such, the acceptors by a divided court were held personally liable: *Madden v. Cox*, 5 U. C. App. R., 473, affirming 44 U. C. Q. B., 542.

A lease, under seal, to "Thomas Laidler, President, and others, directors, being the board of managers of the Garrettsville Agricultural Society and Farmers' Club, of the town, county and State aforesaid, of the second part, witnesseth," and signed by the said Laidler and others, without any addition to their names, is, on its face, the contract of the individuals signing it, and not of the Garrettsville Agricultural Society and Farmers' Club; though the circumstances attending the execution may show it to be the contract of the association, when the persons signing it would not be liable individually: *Whitford v. Laidler*, 25 Hun, 136.

A draft began: "Mr. Adam Simon, Executor, will please pay," etc., and concluded as follows: "and charge the amount against me and of my mother's estate," and was accepted by writing across its face, "Accept. Adam Simon, Executor." Held, that the acceptor was liable in his capacity as executor only: *Schmittler v. Simon*, 25 Hun, 76.

A note, whereby "we promise to pay as trustees of Corinth Lodge, No. 683 F. and A. M., to D. or bearer, one hundred and twenty-five dollars," and signed by individuals, without any addition or proof that they were trustees and authorized as such to make the note, and received no part of the proceeds, is not the note of such individuals, and they are not personally liable thereon: *Stearns v. Allen*, 25 Hun, 558.



A school committee agreed in writing to pay a teacher of a free school the sum of thirty dollars per month, and the teacher brought an action in a justice's court against the committee to recover the same: Held, school committeemen are public officers, and not personally liable on contracts made in the line of their duty; nor will this action lie against them in their corporate capacity: *Robinson v. Howard*, 84 N. C., 151.

A draft, "The First National Bank of Alexandria, Virginia, pay to the order of A., seven thousand dollars.

W. G. Williams, Vice President,

A. E. Aistrop, Sec'y,"

in the hands of the party for whom it was originally intended, may be shown to be the draft of a humane association of which the signers are president and secretary: *Metcalf v. Williams*, 1 U. S. Supr. Ct. Reporter, 176.

In Illinois, a note, whereby "We the trustees of," etc., promise to pay, signed by several persons with the words "Trustees of," etc., is binding upon the corporation of which they are trustees, and not upon them personally: *Newmarket, etc., v. Gillet*, 100 Ills., 254.

The owner of goods is entitled to recover from a broker who, upon the employment of his factor, has sold his goods, such proceeds of the sale as the broker, at the time of being notified of the principal's ownership, still retains in his hands, subject to such equities as existed between the factor and the broker: *Wright v. Cabot*, 47 N. Y. Super. Ct. R., 229.

If one deals *bona fide* with an agent as owner, without knowledge of his agency, he may set off any claim he may have against the agent in answer to the demand of the principal: *Frame v. William Penn, etc.*, 97 Penn. St. R., 309, 13 Lanc. Bar, 169.

The contracts of trustees, though for the benefit of the trust estate, impose upon them a personal liability only in the absence of statutory provisions to the contrary: but, when the trustee is also one of the beneficiaries of the trust estate, the person who has rendered services for the estate at his instance, and has obtained a judgment at law against him, with an execution thereon returned unsatisfied, may, by bill in

equity, reach and subject his interest in the trust estate.

The principle is well settled that a trustee may make necessary repairs, and should always be reimbursed for the cost of necessary improvements, rendering permanent benefit to the trust estate, unless prohibited, either expressly or by clear implication, by the terms of the instrument creating the trust; but when a testamentary trustee, being the testator's widow, is authorized and directed to keep his estate together in her possession, and to apply the rents and profits to the support of herself and children until the youngest attains its majority, with power to sell and reinvest in other property, she has no power to erect permanent improvements on a vacant lot to the extent of four times its value: *Dickinson v. Conniff*, 65 Ala., 581.

A sale of goods to a trustee on his individual credit, the seller not knowing of the trust, but the goods being, in fact, bought and used for the trust estate, and being suitable and necessary therefor, and the trustee, as such, afterwards having given his negotiable note for the unpaid balance of the price, and the complainant having purchased the note, the complainant is the owner of the balance of the account represented by the note, and is a creditor of the trust estate. The trustee, taking up the trust note by the substitution of his own individually, with a note on a third person given for rent, as collateral security, and afterwards collecting the rent and using it for the benefit of the trust estate, and both himself and the maker of the collateral note being insolvent, the trust estate is liable to the complainant in equity for the value of the rent so collected, or so much thereof as may be necessary to pay the trust note so taken up. The note of the third person for rent having been turned over by the trustee and received by the complainant as collateral security, also, for an account partly made and partly to be made, by the trustee as an individual, with the complainant, for supplies suitable and necessary for the trust estate, the same rule applies in respect to said account as the rule above announced with reference to the trust note. The complainant can proceed in equity against

1879

Long v. Millar.

the trust estate for the amount of the account as well as for the amount of the note: *Kupferman v. McGehee*, 68 Ga., 250.

An administrator, who is also a tenant in common with his children, may, during the minority of his children, borrow money on the security of the property in order to make improvements thereon, and will be allowed for the amount of benefit to the land by the expenditure: *Droop v. Colonial Bank*, 7 Vict. L. R. (Eq.), 71.

While, as a general rule, a receiver will not be permitted to lay out more than a small sum at his own discretion in the preservation or improvement of the property under his charge, but should in all cases where it is practicable or the circumstances of the case will permit, before involving the estate in expense, apply to the court for authority for so doing. This general rule should not be so rigidly enforced as to work wrong and injustice, where the receiver has acted in good faith and under such circumstances as will enable the court to see that if previous authority had been applied for, it would have been granted.

Where a receiver, without orders from the court, paid insurance and other items which the court would have allowed, the court allowed him for such payments: *Brown v. Hazellurst*, 54 Md., 28.

The late S., in his lifetime, "ordered plaintiff to put stone steps to a residence, also general repairs to the house and front gate, new kitchen range, and also all general repairs to the house; in fact, all that Mrs. S., who was present, required."

The agent of the executors, without communicating with them, told plaintiff that some of the work was of immediate necessity, and must be done; and afterwards, having seen the executors, he told plaintiff "to complete the work as originally directed by S." Work was done under these various directions to the value of £622, and was approved of by the executors. Other work was also done, in another place, which could not be regarded as done "as originally directed by S." The executors paid on account of a general bill a larger sum than was sufficient to cover the items which could not be regarded as done as originally directed

by S. Plaintiff sued the executors personally, and not in their character of executors, and obtained a verdict.

On motion, made under leave reserved for a nonsuit, held, by the court, Molesworth, J., doubting, but not differing from the judgment, that the defendants were not liable as executors, there having been no new consideration for any fresh contract with the executors, and no evidence whatsoever to go to the jury of a contract between them and the plaintiff by which they ever intended to render themselves personally liable: *Cutler v. Barber*, 1 Wyatt & Webb, Vict. (Law), 128.

No expenses incurred by a *cestui que trust* of a fund for life, nor debts contracted for or by him, nor penalties resulting from his acts, can be paid out of income after his death, even though the persons upon whom the trust estate devolved were his own children, claiming not through him, but under the provisions of the trust.

As to expenses of filing account, counsel fees, copying account, and moneys advanced by trustee to pay funeral expenses: *Buckingham's Estate*, 12 Phila. Rep., 105.

It is a general principle that a trust estate must bear the necessary expense of its administration.

One jointly interested with others in a common fund, and who in good faith maintains the necessary litigation to save it from waste and destruction and secure its proper application, is entitled in equity to reimbursement of costs as between solicitor and client, either out of the fund itself, or by proportional contribution from those who receive the benefit of the litigation.

Where a large number of bonds issued by a corporation are secured by a trust fund which is being wasted and misapplied by the trustees, or which they refuse or neglect to apply to the payment of the bonds, a holder of a portion of such bonds, who in good faith files a bill to secure the due application of the fund and succeeds in bringing it under the control of the court, for the common benefit of the bondholders, is entitled to have his costs, counsel fees, and necessary expenses of the litigation—that is to say, his costs as between solicitor and client—paid out of the fund before its distribution.

Such a complainant, however, is not

entitled to an allowance for his private expenses, such as travelling fares and hotel bills, nor for his own time or personal services.

The practice of allowing large and extravagant counsel fees, and commissions to trustees, complainants, and receivers and their counsel, to be paid out of trust funds under the control of the court, commented on and disapproved: Trustees of the Internal Improvement Fund of Florida v. Greenough, 14 Cent. L. J., 469.

On a blank indorsement of a note, oral evidence that the indorser should not be liable on the note is inadmissible: Martin v. Cole, 7 Cinn. L. Bull., 169, 1 U. S. Sup. Court Repr., 212, 3 Morr. Trans., 17.

An accommodation indorser cannot set up, in a suit against him by his indorsee, that there was an agreement between them, at the time of putting their names on the paper, that such indorsement should constitute a joint and not a successive liability: Johnson v. Ramsay, 43 N. J. L., 279.

As to the sufficiency of a memoranda to satisfy the statute of frauds, see 25 Eng. R., 432 note.

A contract for the sale of lands must be certain and complete in itself, or capable of being made certain by reference to other writings which are designated in it. It cannot be supplemented by parol evidence to identify the subject-matter of the contract.

Where an agent of the defendant by his authority wrote to the plaintiff, offering to purchase "your interest in the real and personal estate," held, that parol evidence could not properly be admitted to prove that plaintiff and defendant were brother and sister, and that the estate referred to was the estate of their father who has died intestate, and that without explanation there was no identification of the subject-matter of the contract: Dickinson v. Rawson, 12 N. Y. Week. Dig., 564; S. C., mere memorandum, 25 Hun, 60.

A contract cannot be said to be in writing, within the meaning of the statute of frauds, unless the parties, as well as its entire terms, can be gathered from the instrument, or from some other written instrument referred to therein, without the aid of parol testimony: Marion County v. Shipley, 14 Cent. L. J., 112.

To satisfy the statute of frauds, a memorandum of a contract for the sale of realty must be such as to enable the court to declare the meaning of the parties, and to identify the property without having recourse to oral testimony. Scarritt v. St. Johns, etc., 7 Mo. App., 174.

Where such a contract is contained in several papers, oral testimony is inadmissible to show what papers are referred to: this must appear from the face of the document itself: Scarritt v. St. Johns, etc., 7 Mo. App., 174.

A written memorandum of agreement is not sufficient within the meaning of § 6, ch. 43, of the Statute of Frauds and Perjuries, which is merely a piece of paper containing the date thereof, the name of the place where written, the names of certain parties and figures, and signed by the party intended to be charged thereby.

While the form of the memorandum is not material, it must state the contract with reasonable certainty, so that the substance can be made to appear and be understood from the writing itself, or by direct reference to some extrinsic instrument or writing, without having recourse to parol proof: Reid v. Kenworthy, 25 Kans., 701.

An order made by a board of county commissioners offering bounty to volunteers for the military service of the United States, does not, within the meaning of the statute, amount to a "contract in writing": Marion County v. Shipley, 14 Cent. L. J., 112.

A contract for sale of land entered into by an auctioneer, "on account of the vendor," and "as agent for the vendor," but not naming the vendor, is void under the statute of frauds. But where the vendor signed replies to requisitions on title referring to such contract, held, that there was then a sufficient signature under the statute: Buxton v. Bellin, 3 Vict. L. R. (Eq.), 243.

The defendant purchased at an auction certain lots of maize, the property of the plaintiffs, the bulk of which was in store. In an action for not removing the maize within the time mentioned in the conditions of sale, and to recover the loss upon a resale, the plaintiffs and the auctioneer deposed that the sale was by sample, and it appeared that samples had been exhibited

1879

Long v. Millar.

at the auction, but the entry in the auctioneer's book of sales to the defendant omitted to state that the sale was by sample. Held, that the sale having been in fact by sample, the entry in the auctioneer's book omitted a material term of the contract, in not stating that the sale was by sample, and therefore was not a sufficient memorandum of the contract under the statute of frauds.

The plaintiffs having subsequently to the auction, furnished the defendant with an invoice of the lots sold, stating the quantities, prices and places where stored, accompanied by a letter referring to such invoice, and requesting payment, the defendant replied by a letter signed by him, in which he acknowledged the receipt of the invoice, and offered to accept the plaintiff's draft at three months for the amount, and to give them a lien on the goods in the meantime: Held, that the letters were affected with the same infirmity as the entry in the auctioneer's book, and did not constitute a sufficient memorandum of the contract under the statute of frauds: *M'Mullen v. Helberg*, L. R., 6 Ir., 463.

At a sale by auction, the auctioneer had a book in which were entered the conditions of sale. Under these the auctioneer's name was written by himself; and underneath were columns in which were entered the lots, the buyers, and the prices paid. R., a buyer, bought several consecutive lots. In the line of the first lot bought by him was entered his name, "Ross," in the proper column; but in the lines of the next succeeding lots bought by him was entered only "Do." in the proper column. On a rule  *nisi* to enter a nonsuit, on the ground that the signature by entry of "Do." underneath the name "Ross," in the column of buyers, was not a sufficient signature under the statute of frauds to bind the buyer as to the lots signed "Do." Held, that the signature was insufficient: *Williams v. Ross*, 2 Wyatt & Webb's (Vict.) Law, 285.

See also *Shiel v. Colonial Bank*, 1 Vict. R. (Eq.), 40.

An auctioneer employed his clerk at a sale by auction to act as amanuensis, by writing down in the sales book the

name of each person to whom the lots were respectively knocked down.

Held, that, in order to comply with the 17th section of the "statute of frauds," the name of each purchaser should be called out by the clerk before making the entry of the name in the sales book: *Moss v. Cohen*, 3 Vict. R. (Law), 205.

A purchaser at auction may, at any time after the land has been knocked down to him but before the auctioneer has signed the purchaser's name to the contract of sale, revoke the auctioneer's authority to sign the contract as his agent: *Eckroyd v. Davis*, 3 Victorian R. (Law), 228.

An agreement annexed to conditions of sale, at a sale by auction, to which D. (an illiterate person) had put his mark, stating that D. had purchased from S., the vendor, for the sum of £250, the premises mentioned in the annexed particulars, subject to the conditions of sale, is a good memorandum in writing within the 4th section of the Statute of Frauds.

A receipt given by the auctioneer's clerk to D., three days after the auction, and signed by the clerk, acknowledging payment of part of the purchase-money, for "lot four (4), Mr. John Stafford's property," is not such a memorandum in writing as would bind the vendor within section 4 of the statute.

*Seem*, that the name of the auctioneer printed on the back of the particulars and conditions of sale, is sufficient to bind the vendor: *Dyas v. Stafford*, L. R., 7 Ir., 590.

At a sale by auction, where the auctioneer's clerk writes the names of the purchasers for them in the auctioneer's book, the purchaser is not bound, in the absence of evidence, that he knew of this mode of proceeding, and by acquiescence authorized the clerk to write his name for him: *Hill v. Willis*, 6 Vict. L. R. (Law), 193.

A broker's note or memorandum of sale of goods, containing the names of the vendor and vendee, and the terms of sale, and *delivered to both parties*, makes a valid contract of sale within the statute of frauds. What is sufficient evidence of the *delivery* of such a memorandum? *Newbery v. Wall*, 84 N. Y., 576.

[5 Common Pleas Division, 1.]

Nov. 26, 1879.

**\*BURKE V. THE SOUTH EASTERN RAILWAY COMPANY. [1**

*Railway Company—Continental Ticket—Book of Coupons—Condition inside—  
Notice of.*

Outside the cover of a paper book of coupons forming a railway ticket, issued to the plaintiff by the defendants, was printed the name of their railway, the words "Cheap return ticket, London to Paris and back, Second class," and a statement of the period and journey for which the ticket was available, but no reference to the inside of the cover. On the inside, and apparent on turning the leaf, was a condition limiting the responsibility of the defendants to their own trains.

The plaintiff having been injured while travelling by virtue of the ticket, in a French train, sued the defendants. They set up the condition. The plaintiff had not read and did not know of it.

The jury were directed that if it was brought to his notice it would afford a defence, and, on being asked the question, suggested in *Parker v. South Eastern Ry. Co.* (2 C. P. D., 416; 21 Eng. R., 349), whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff, answered that it was not, and found a verdict in his favor. He moved for judgment.

Held, distinguishing *Henderson v. Stevenson* (L. R., 2 H. L. (Sc.), 470), that the whole book was the contract accepted by the plaintiff, and that he, therefore, could not reject the condition which was one of its terms, and that judgment should be entered for the defendants.

**MOTION for judgment.**

Action to recover damages for personal injury caused to the plaintiff through the negligence of the defendants.

\*The trial took place before Cockburn, C.J., and a [2 jury, when it appeared that the plaintiff had taken from the defendants an ordinary cheap return ticket consisting of a small paper book with eight leaves. On the cover, or outer leaf, which formed the first page, was printed the number of the ticket, and the words, "South Eastern Railway Cheap return ticket. London to Paris and back. Second class. Available by night service only. This ticket is available for 14 days, including the day of issue and expiry. Example. A ticket issued on the 1st of the month will be available for the return journey up to and including the 14th. Available for the return journey by the South Eastern or London, Chatham and Dover Railways." Inside the cover, that is to say, on the second page, statements were printed that "The cover without the coupons or the coupons without the cover are of no value," and that "Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being 'booked' to travel over the railways of other companies . . . ." The inside leaves were coupons, each of which was to be given up at a different stage of the

1879

Burke v. South Eastern Railway Co.

journey. The plaintiff while travelling under this ticket on a railway in France was injured through the negligence of the railway servants. He brought this action against the defendants, and gave evidence to the effect that, although he had often made the same journey with similar tickets, he had never read and did not know of the condition.

The defendants did not dispute the truth of his statement, but relied on the condition.

The learned judge directed the jury, that if it was brought to his notice it would be a defence, and adopting a form of question suggested by the Court of Appeal in *Parker v. South Eastern Railway Co.* (<sup>1</sup>), asked the jury whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff. The jury found that it was not, and gave their verdict for him with £250 damages.

*McIntyre*, Q.C. (*Barnard*, with him), for the plaintiff: On the finding of the jury the plaintiff is entitled to judgment. *\*Henderson v. Stevenson* (<sup>2</sup>) is in point. There was in that case a contract on the face of a ticket, with no reference to a condition on the back, and the House of Lords held that the passenger who had not looked at the back was not bound by the condition. The judgment of Lord Cairns, C. (<sup>3</sup>), is conclusive in favor of the present plaintiff.

[LORD COLERIDGE, C.J.: I thought that I followed *Henderson v. Stevenson* (<sup>4</sup>) in *Parker v. South Eastern Ry. Co.* (<sup>5</sup>), but that case was overruled by the Court of Appeal, where Bramwell, L.J., gave a judgment, based on reasoning which seems to me unanswerable, in favor of the defendants.]

The condition must be brought to the traveller's notice. The Lord Justice agrees that if the question whether the plaintiff ought to have read the condition is one of fact it should be left to the jury, but no doubt suggests that it is a question of law. In *Parker v. South Eastern Ry. Co.* (<sup>6</sup>) the words "See back" were on the face of the ticket. Here, however, there was nothing to call the attention of the plaintiff to the condition on the inside of the cover. He did not read it and "was certainly under no obligation to read the ticket, but was entitled to leave it unread if he pleased": see per Mellish, L.J., at p. 423. The contract was that he was to be carried to Paris and back and to deliver the coupons at the different stages of the journey.

[LINDLEY, J.: *Harris v. Great Western Ry. Co.* (<sup>7</sup>) was

(<sup>1</sup>) 2 C. P. D., 416; 21 Eng. R., 349.

(<sup>2</sup>) Law Rep., 2 H. L. (Sc.), 470.

(<sup>3</sup>) Law Rep., 2 H. L. (Sc.), at p. 475.

(<sup>4</sup>) 1 C. P. D., 618; 2 C. P. D., 416, at p. 426; 21 Eng. R., 349.

(<sup>5</sup>) 1 Q. B. D., 515; 17 Eng. R., 156.

a contemporaneous case, but decided contrary to *Parker's Case* <sup>(1)</sup>.

LORD COLERIDGE, C.J.: Both the Queen's Bench Division in the one case and the Court of Appeal in the other, while admitting the authority of *Henderson v. Stevenson* <sup>(2)</sup>, distinguish it for various reasons.]

It governs the present case.

*Sir H. Giffard*, S.G. (*A. M. B. Bremner*, with him), for the defendants, was not heard.

LORD COLERIDGE, C.J., after stating the case and the terms of the ticket, continued: The defendants say that the injury \*complained of having happened in France, and beyond [4 the limits of their own line, they are not responsible. *Prima facie* that would be a complete answer to the action, but the Lord Chief Justice, who tried the case, having before him various decisions of this and other courts on the subject of the responsibility of railway companies when they issue printed contracts, took the opinion of the jury on certain points, one of which was, whether there was reasonably sufficient notice of this term of the contract given by the defendants to the plaintiff, and the jury found in the negative. For the purposes of this decision the jury may be taken to have found that the plaintiff did not know of the condition. Certainly there was no affirmative evidence to show that he had read or knew of this term. In my opinion it does not much matter which form of expression, viz., "term," or "condition," is used. I will take the finding of the jury most strongly against the defendants, and assume that the plaintiff was admitted not to have read and not to know of this condition, however improbable such a state of things was, and I will decide, as if I believed it, whether I do or do not. The question is, Does that, under the circumstances, afford any defence? In my opinion it affords none. The contract, as I understand it, can only be this little book, and the whole of this little book. This is the contract, and these are the terms on which the defendants agreed to take the plaintiff to Paris and back, and in an ordinary case that would be conceded. But it is supposed that on this peculiar subject of railway passengers the contrary has been decided by the decision of the highest tribunal. I should, of course, submit to follow the authority of the case of *Henderson v. Stevenson* <sup>(2)</sup>, if it applied, whether I agreed with it or not, and should indeed have no power to do otherwise than to decide in accordance with it. It was attempted to

<sup>(1)</sup> 1 C. P. D., 618; 2 C. P. D., 416, at p. 426; 21 Eng. Rep., 349,

<sup>(2)</sup> Law Rep., 2 H. L. (Sc.), 470.

assimilate this case to *Henderson v. Stevenson* <sup>(1)</sup>, which shortly stated was this: There was a contract to take a passenger from Dublin to Whitehaven, and a condition printed on the other side. On the same side of the paper or card on which "Dublin to Whitehaven" was printed, there was no reference at all to what was printed on the other. It was admitted that if both sides were taken as the contract, the defendants were entitled to succeed, but it was said 5] that \*one side only was to be taken as the contract, because there was no reference to the other side, and that the jury must be taken to have found that the plaintiff had a right to assume, and did assume, that the one side contained the whole contract, and the terms on which he was agreeing with the defendants. That case was one of a bailment of luggage to the defendants for reward, and on the face of the paper there would arise an ordinary common law contract. The House of Lords held, in effect, that there was no evidence to show that any other than the common law contract had been entered into by means of that piece of paper. The decision is based on the view which the House of Lords took of the facts. The House of Lords assumed that the whole contract was contained on the one side of the one piece of paper. Now, if the House of Lords would have come to the conclusion that the contract in such a case as this was really limited by the first side of the first leaf of these pages their decision in *Henderson v. Stevenson* <sup>(1)</sup> would be binding on us. But I think the facts here are entirely different, and I see the widest distinction between the facts of the one case and the other. Here is a small book with many pages, and it is admitted that the whole of the leaves are, during the continuance of the contract, to be made use of, and the passenger cannot turn over the first sheet and make use of the first coupon without having under his eyes the condition on which the defendants rely. It cannot be contended that the first sheet forms the whole contract because it was admitted that the coupons form part of the contract. Then if the first page and all the coupons form part of the contract, on what ground is page 2 to be rejected? The defendants might fairly say: "This is the contract, we contract on no other terms than these, the plaintiff has taken this contract. Fraud is not suggested, and by the ordinary application of eyesight he might have seen the condition." The mere fact of his not choosing to read, or even of his not having read the term, which was not concealed from him, is no ground whatever for rejecting

<sup>(1)</sup> Law Rep., 2 H. L. (Sc.), 470.



that any more than any other part of the contract. So, *bona fide* accepting and not presuming to doubt the authority of *Henderson v. Stevenson* (') in cases brought within it by their facts, I am of opinion that this case, at least, is not \*within it. We are asked to say that the condition [6 is not part of the contract, because there is not written in large letters at the bottom of the first page, "Read the next page." This in effect is the contention of the plaintiff. There is neither principle nor authority for such a proposition, and I think that the defendants are entitled to judgment.

LINDLEY, J.: I am of the same opinion. The question depends entirely on the answer to the inquiry, What was the contract, if any, into which the parties entered? The only contract entered into was thus formed: the plaintiff paid a sum of money for a journey to Paris and back, and he received this ticket. The jury have not found what the contract was, the question was not put to them in that shape, but they may be assumed to have found that the plaintiff did not know of the restrictive condition, and they have found that sufficient notice of it was not given to him. That leaves open the question what was the contract? Can the plaintiff make out a contract without that condition? I think it impossible for him to do so. If the jury had found that the contract was what was printed on the first page or on the coupons without the cover, the verdict would be so manifestly against the evidence that it could not stand. But they have not so found. I think that the answer to the question, What was the contract? is, "Here, in this small book, is the contract." The facts of *Henderson v. Stevenson* (') were different. On the face of the card in that case was, "Dublin to Whitehaven," and nothing else, and on the back a condition. The House of Lords, as it were, split it in two, and said there was room to find that the contract was what appeared on the face of the card. But it would be impossible to split this contract up. It does not admit of it. Its physical form is altogether different. On these grounds I think that the plaintiff is not entitled to judgment and that the defendants are, because the plaintiff cannot sue on a contract and ignore one of the terms.

*Judgment for the defendants.*

Solicitor for plaintiff: *Parry*.

Solicitor for defendants: *Stevens*.

(') Law Rep., 2 H. L. (Sc.), 470,

See 17 Eng. Rep., 68 note; 21 id., 68 note; 28 id., 191 note; *ante*, p. 550 note; 10 Am. Law Record, 133: *Post*, *Foulkes v. Metropolitan*, etc., p. 740.

In the absence of a special contract, the liability of a common carrier does not extend beyond the terminus of his route: *Stewart v. Terre Haute*, etc., 1 McCrary, 312.

A railroad company, which is one of several over whose roads goods are to be carried in a continuous transit from St. Louis to New York, is not liable, in the absence of an express agreement to that effect, for any loss, damage, or delay, except that which occurs on its own road.

The fact that such a company joined with others, whose roads made a continuous line between those points, in establishing a through rate of fare to be divided among themselves according to the length of their roads, does not of itself imply an obligation to carry beyond its own road, or to be liable for the default or negligence of the other companies of the through line.

Nor does the fact that a corporation, calling itself the Erie and Pacific Dispatch Company, gave a bill of lading to the owners or shippers, professing to act as agents of all the companies comprising the line over which the goods were to be transported, bind each company for the default of all, in the absence of an agreement to that effect on the part of the railroad companies: *St. Louis*, etc., *v. St. Louis*, etc., 1 U. S. Sup. Ct. Reporter, 280.

A contract that the liability of a carrier shall extend beyond the terminus of his own route, is not established by proof that a carrier accepted the goods with knowledge of their destination, and named the through rate for the same: *Stewart v. Terre Haute*, etc., 1 McCrary, 312; *McCarthy v. Terre Haute*, etc., 9 Mo. App. R., 159; *Harding v. International*, etc., 39 Leg. Int., 150, U. S. Dist. Ct., East'n Dist. Penn., Butler, J.

A common carrier who has not limited his responsibility is undoubtedly responsible for losses, whether on vehicles controlled by himself exclusively, or belonging to and controlled by others, because he is an insurer for the safe delivery of the article which he has agreed to pay.

But when he has limited his liability so as to make himself responsible for ordinary care only, and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his (the carrier's) negligence or the negligence of his servants, and not the negligence of persons over whom he has no control: *Bank*, etc., *v. Adams Express Co.*, 1 Flippin, U. S. C. C., 242.

If, in his employment, he uses the vehicles of others, over which he has no control, and uses reasonable care—that is, such care as ordinarily prudent persons engaged in like business use in selecting vehicles; and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same, unless it arises from his want of care, or the want of care of his employees: *Bank of Kentucky v. Adams Express Co.*, 1 Flippin, U. S. C. C., 242.

A steamship company, operating a line of ocean steamships from Europe to America, but selling through tickets from various points in Europe, is liable for the loss of a passenger's luggage by an independent carrier by whose vehicles it is transporting the passenger from the point where he purchased his ticket to the port of embarkation, if the passenger purchased his through ticket upon the faith of representations made by the steamship company's local agent, who sold the ticket, that the company undertook the safe carriage of such luggage over the whole route: *Maskos v. American*, etc., 9 Fed. Rep., 698.

A common carrier is bound to carry all articles within the line of his business upon the terms and conditions imposed, if the shipper shall so demand. He has a right, however, to charge in proportion to the risk assumed by him. But when he has undertaken to carry at a less rate than he would have a right to charge, and would charge, if he undertook to carry only upon the conditions imposed by law, and has, by his receipt delivered to the shipper, stipulated for a reasonable limitation of his responsibility and the shipper has accepted the receipt without objection, the latter is as much bound by the contract thus made, as any other party would be: *Bank of Kentucky v. Adams Express Co.*, 1 Flippin, U. S. C. C., 242.

Words on a railroad ticket, or baggage check, limiting the liability of the carrier to a specific amount for loss of baggage, are not binding on a passenger, unless, with knowledge of such limitation, he agrees to it: *R. R. Co. v. Campbell*, 36 Ohio St. R., 647.

A contract with two railroad companies for the transportation of certain sheep, by its terms, in consideration of a reduction of the charges for freight, released them from liability for injuries to the sheep "caused by burning of hay, straw, or other material used for feeding said animals, or otherwise."

The contract contained no words expressly exempting the carriers from liability for their own negligence. A fire occurred in the cars which destroyed a number of the sheep, the loss resulting, as found by the jury in an action brought to recover damages, from the negligence of the defendant, one of said companies, in omitting to supply the train with such appliances as would have enabled those in charge to have stopped it and extinguished the fire before serious damage had resulted: Held, that the exemption did not include negligence, and that defendant was liable. *Crogin v. N. Y. C. R. R. Co.* 51 N. Y. 61, distinguished.

Also held, that the non-joinder of the other company as a party defendant was no ground for a nonsuit, as the action was brought, not upon the contract, but for negligence, for which the party guilty thereof was separately liable: *Holsapple v. Rome, Watertown, etc., R. R. Co.*, 86 N. Y., 275.

In an action against a railway company as carriers, for breach of an alleged contract, in failing to carry pigs of the plaintiff from a station on their railway in Ireland to London within a reasonable time, the defendants, amongst other defences, pleaded that the pigs were received by them under a certain "reasonable" condition in that behalf, signed by the plaintiff, providing that, in consideration of carriage at a reduced rate or charge, below the ordinary rate, the defendant company should be free from all liability for injury or delay in the transit or conveyance of the pigs, unless occasioned by the intentional and wilful misconduct of the defendants' servants, and that the injury and delay complained of was not occasioned by such intentional or

wilful misconduct. A verdict having been directed for the defendants, subject to leave reserved for the plaintiff to move to have the verdict changed into one for him for damages, contingently assessed, if the case should have been left to the jury upon any of the issues raised by the pleadings:

Held, that, assuming this defence valid as a pleading, the burden of proving that the condition relied on was a reasonable one lay upon the defendants; that, therefore, the question whether an alternative higher rate, at which, as the company alleged, they offered to carry upon the ordinary carrier's liability, was a reasonable alternative, should not have been withdrawn from the jury, and that, under the reservation, the plaintiff was entitled to the verdict: *Gallagher v. Great Western Railway Company* (Ir., 8 C. L., 326), commented on and adhered to.

*Semble*, the plea was bad; and if, but for it, the plaintiff were entitled to a verdict upon the other issues of fact, judgment should have been directed for him, irrespectively of this defence: *Ruddy v. Midland, etc.*, 8 L. R. (Ir.), 224.

As an alternative to a carrier's contract which admittedly contained unreasonable conditions, the carriers offered to carry at certain reasonable rates, but subject to a condition "that they would not be accountable for the correct selection of the owner's cattle on landing, nor on loading into the wagon at L." (the termination of the sea journey), "nor on unloading at destination." Held, that this condition, upon its fair construction, would extend to exempt the carriers from responsibility for negligence or default on their part, in the selection of the cattle on landing, and was therefore unreasonable and unjust: *M'Nally v. Lancashire, etc.*, 8 L. R. (Ir.), 81.

*Semble*, per Lord O'Hagan, L.C., and Fitz Gibbon, L.J., that a carrier's contract, in itself unreasonable, may be validated by the offer of an alternative contract which, though limiting the ordinary common law liability of the carrier, would, in itself, constitute a just and reasonable contract, and if standing alone would satisfy the requirements of the Railway and Canal Traffic Act.

In considering whether conditions

1879

Matthiessen v. London and County Bank.

annexed to carriers' special contracts are just and reasonable, such conditions must be construed according to the ordinary meaning of their language, without implying any limitation or exception not expressed: *M'Nally v. Lancashire, etc.*, 8 L. R. (Ir.), 81.

Where the shippers of live stock, over a railroad, entered into an agreement with the railroad company, whereby it was stipulated and agreed that the carrier should not be responsible for injury to the stock in consequence

of a failure or neglect to water or feed them while in transit, and the carrier negligently carried them beyond the destination to which they were shipped, in consequence of which they were deprived of the attention of the shippers and their agents, and were without food or water during two days; held, the carrier was liable for damages occasioned to the stock thereby: *Bryant v. Southwestern R. R. Co.*, 14 Central L. J., 373, Sup. Ct., Ga.

[5 Common Pleas Division, 7.]

May 21, 1879.

7] \*MATTHIESSEN and Another v. THE LONDON AND COUNTY BANK.

*Banker—Crossed Checks Act, 1876 (39 & 40 Vict. c. 81), s. 12*

Sect. 12 of the Crossed Checks Act, 1876 (39 & 40 Vict. c. 81), exonerates a banker from all liability to the true owner of a check crossed in blank,—that is, with the words "and company" or an abbreviation thereof between two parallel transverse lines, or two parallel transverse lines simply, but without the words "not negotiable,"—where the banker has *bona fide*, in the usual course of business, and without negligence, received payment of it for a customer, notwithstanding any defect in the title of the latter, whether by reason of a forgery of the indorsement or otherwise.

STATEMENT of claim. 1. The plaintiffs are wine merchants carrying on their business in London.

2. For some time before and in and about the month of July, 1877, and in and about the month of January, 1878, one J. W. Maddie was in the plaintiffs' employ as servant and traveller.

3. As such servant and traveller Maddie received from the plaintiffs' customers, by and with the plaintiffs' authority and for and on their behalf, payment for goods sold by the plaintiffs to such customers.

4. On or about the 20th of July, 1877, Oliver & Son, of Bury St. Edmunds, in payment for goods which had been sold to them by the plaintiffs, gave to Maddie a check dated the 20th of July, 1877, for £150 13s. 11d., drawn by Oliver & Son upon Oakes, Bevan & Co., bankers, Bury St. Edmunds, and payable on demand to Messrs. H. Matthiessen & Co., or order, which check Maddie received for and on behalf of the plaintiffs and with their authority.

5. On or about the 15th of January, 1878, J. Mott & Co., of Leicester, in payment of goods which had been sold to

them by the plaintiffs, gave to Maddle a check dated January 15th, 1878, for £62 11s. 10d., drawn by J. Mott & Co. upon T. & T. T. Paget, Leicester Bank, payable on demand to H. Matthiessen & Co. or order, crossed with the words "& Co.," which check Maddle received for and on behalf of the plaintiffs and with their authority.

6. On or about the 24th of January, 1878, C. Pratt & Sons, of Lincoln, in payment for goods which had been sold to them by \*the plaintiffs, gave to Maddle a check dated [8 January 24th, 1878, for £30 16s. 9d., drawn by C. Pratt & Sons upon Smith, Ellison & Co., Lincoln Bank, payable to H. Matthiessen & Co. or order, and crossed with the words "& Co.," which check Maddle received for and on behalf of the plaintiffs and with their authority.

7. The three checks received by Maddle as stated in paragraphs 4, 5, 6 herein, were never delivered to the plaintiffs, nor was any or either of them; but Maddle stole and embezzled the said three checks from the plaintiffs.

8. Maddle, without the knowledge, sanction, or authority of the plaintiffs, forged the plaintiffs' name on the back of each of the said three checks.

9. The plaintiffs never indorsed nor authorized the indorsement of the said three checks nor of either or any of them.

10. After Maddle had stolen and embezzled the said three checks and forged the plaintiffs' indorsements thereon as stated in paragraphs 8 and 9 herein, the said three checks, without the knowledge, sanction, or authority of the plaintiffs, were paid into the defendants' bank and were received by the defendants.

11. The defendants, having so received the three checks presented the same for payment to the bankers upon whom the said checks were respectively drawn, as mentioned in paragraphs 4, 5, and 6 herein, and received from each of the said bankers the amount for which each of the said checks was respectively drawn, as mentioned in the said paragraphs, and retained and appropriated to their own use such amounts, being £150 13s. 11d., £62 11s. 10d., and £30 16s. 9d., making together £246 2s. 6d.

12. The defendants by receiving and dealing with the said checks, as stated in paragraphs 10 and 11, converted such checks to their own use, and wrongfully deprived the plaintiffs of the possession of the said checks.

13. The plaintiffs claim £244 2s. 6d. damages, being the value of the said three checks.

14. The plaintiffs in the alternative will claim £244 2s. 6d.,

for money payable by the defendants to the plaintiffs, for money had and received by the defendants for the use of the plaintiffs, under the circumstances stated in the preceding paragraphs of this statement of claim.

9] \*STATEMENT of defence. 1. That the defendants are bankers carrying on business in London and other places, and are in the habit of collecting checks drawn upon country bankers for their customers the holders of such checks; and that the three checks in the statement of claim mentioned were all checks, as mentioned in the statement of claim, drawn upon country bankers.

2. That, in the usual course of business, two of the said three checks were handed to the defendants by one of their customers named James Fowler for collection, the said James Fowler being then the holder of the said checks, and having an account at the defendants' bank; and the other of the said three checks was handed to the defendants by one of their customers named William Wood for collection, the said William Wood being then the holder of the said check, and having an account at the defendants' bank.

3. The defendants in the usual course of business collected the said three checks from the country bankers upon whom they were drawn, and in the usual course of business placed the amounts so collected to the credit of their customers the said James Fowler and William Wood.

4. The defendants did not know when they received the said three checks from Fowler and Wood, nor when they collected the same as aforesaid, that the plaintiffs' names on the back of any of the said three checks were forged.

5. By reason of the premises, the defendants say that they are not liable to the plaintiffs in the present action.

6. In further answer to the statement of claim, the defendants say that the checks therein mentioned were checks drawn after the passing of "The Crossed Checks Act, 1876" (1), and were crossed checks within the meaning of the said act, and had not the words "not negotiable" on them or on either of them; and that they, when they received the said checks crossed as aforesaid, were and still are bankers, and that they in good faith and without negligence, having received the said checks as in paragraph 2 is set forth, received payment for their customers of the said checks crossed as aforesaid, and in no other way dealt with the said checks or any of them; that by reason of s. 12 of the

10] \*said statute they have incurred no liability to the

(1) 39 & 40 Vict. c. 81.

plaintiffs; and that by reason of the said statute the plaintiffs are not entitled to maintain the present action against the defendants.

Demurrer, on the ground that the facts admitted in the statement of defence show that the defendants are liable for the conversion of the checks and for money had and received, and that s. 12 of the statute mentioned therein does not apply to a check payable to order, the indorsement to which is forged. Joinder.

Waddy, Q.C. (*Oppenheim*, with him), in support of the demurrer: Before the passing of 16 & 17 Vict. c. 59, the crossing of a check with the name of a particular banker did not restrict the negotiability of the instrument to such banker alone, but merely had the effect of compelling the holder to present it through *some* banker: *Bellamy v. Marjoribanks* (1); *Corland v. Ireland* (2). The 19th section of that act, which was passed for the protection of bankers, protects the banker upon whom the check is drawn, where it "purports to be indorsed by the person to whom the same shall be drawn payable:" but that protection was not extended to a banker who merely received the check from a customer for the purpose of collecting the money: *Ogden v. Benas* (3); *Arnold v. The Cheque Bank* (4). The 12th section of 39 & 40 Vict. c. 81 (5) does not apply to a crossed check \*payable to order, the indorsement of which is forged, [11

(1) 7 Exch., 339.

(2) 4 W. R., 200.

(3) Law Rep., 9 C. P., 513; 10 Eng. R., 283.

(4) 1 C. P. D., 578; 18 Eng. R., 204.

(5) Sect. 4 enacts that, "Where a check bears across its face an addition of the words 'and company' or any abbreviation thereof between two parallel transverse lines, or of two parallel transverse lines simply, and either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the check shall be deemed to be crossed generally:

"Where a check bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the check shall be deemed to be crossed specially, and to be crossed to that banker."

Sect. 5. "Where a check is uncrossed, a lawful holder may cross it generally or specially:

"Where a check is crossed generally, a lawful holder may cross it specially:

"Where a check is crossed generally or specially, a lawful holder may add the words 'not negotiable:'

"Where a check is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent for collection."

Sect. 6. "A crossing authorized by this act shall be deemed a material part of the check, and it shall not be lawful for any person to obliterate or, except as authorized by this act, to add to or alter the crossing."

Sect. 7. "Where a check is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker:

"Where a check is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed or to his agent for collection."

Sect. 8. "Where a check is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on

unless the words "not negotiable" are added to the crossing, whether the person receiving the money for it is a banker or not. If those words are added, the person taking [2] the check, whether a banker \*or any other person, takes it only subject to any defect of title in the person from whom he receives it. The two parts of that section are to be read together, the second branch of it, by reason of the use of the word "but," coming by way of proviso to the first branch; and so the section is to be read as if the words "not negotiable" applied to both parts alike.

*A. L. Smith, contra*: The question is whether the 12th section of 39 & 40 Vict. c. 81 exonerates a banker from liability to the true owner of a check crossed in blank,—that is, with the words "and company" or an abbreviation thereof between two parallel transverse lines, or two parallel transverse lines simply, but without the words "not negotiable," where the banker has *bona fide*, and in the usual course of business, and without negligence, received payment of it for a customer, notwithstanding any defect in the title of the latter. It is submitted that it does. The act was passed for the express purpose of relieving

whom it is drawn shall refuse payment thereof."

Sect. 9. "Where the banker on whom a crossed check is drawn has in good faith paid such check, if crossed generally, to a banker, and, if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the check and (in case such check has come to the hands of the payee) the drawer thereof shall respectively be entitled to the same rights and be placed in the same position in all respects as they would respectively have been entitled to and have been placed in if the amount of the check had been paid to and received by the true owner thereof."

Sect. 10. "Any banker paying a check crossed generally otherwise than to a banker, or a check crossed specially otherwise than to the banker to whom the same shall be crossed, or his agent for collection, being a banker, shall be liable to the true owner of the check for any loss he may sustain owing to the check having been so paid."

Sect. 11. "Where a check is presented for payment which does not at the time of presentation appear to be crossed, or to have had a crossing which has been

obliterated or to have been added to or altered otherwise than as authorized by this act, a banker paying the check in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned, by reason of the check having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than is authorized by this act, and of payment being made otherwise than to a banker or the banker to whom the check is or was crossed, or to his agent for collection, being a banker, as the case may be."

Sect. 12. "A person taking a check crossed generally or specially, bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the check than that which the person from whom he took it had:

"But a banker who has in good faith and without any negligence received payment for a customer of a check crossed generally or specially to himself, shall not, in case the title to the check proves defective, incur any liability to the true owner of the check, by reason only of having received such payment."



bankers from the hardship to which the previous legislation upon the subject of crossed checks had left them exposed. The second branch of s. 12 in terms provides that in such a case as this the banker is relieved from responsibility.

GROVE, J.: I am of opinion that this demurrer must be overruled. It appears to me that the whole question turns upon the language of the statute 39 & 40 Vict. c. 81, and mainly upon the words of s. 12 of that statute. The only assistance for construing that section is to be derived from what may be called the definition clauses of the act. Now, the first part of s. 12 says, "a person taking a check crossed generally or specially." What is a check "crossed generally or specially?" That is explained by s. 4 to be, "where a check bears across its face an addition of the words 'and company,' or any abbreviation thereof, between two parallel transverse lines, or two parallel transverse lines simply, and either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the check shall be deemed to be crossed generally. Where a check bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the check shall be deemed to be crossed specially, and to be crossed \*to that [13 banker." There are certain other provisions, amongst others, in s. 5: "Where a check is crossed generally, a lawful owner may cross it specially." Now s. 12 says: "A person taking a check crossed generally or specially, bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the check than that which the person from whom he took it had."

It cannot be argued that the words there, "bearing in either case the words 'not negotiable,'" are not most important. It is by the use of them that the non-negotiability of the check is effected; so that a person taking a check crossed with those words on it is not to have or be capable of giving a better title than that of the person from whom he had it. The next half of the 12th section,—omitting as I do for the present the word "but,"—states, "A banker who has in good faith, and without negligence, received payment for a customer of a check crossed generally, or specially to himself, shall not, in case the title to the check proves defective, incur any liability to the true owner of the check by reason only of having received such payment." Taking those two parts of the section as they appear on plain reading and grammatically, they each apply to a different state of things. The first part applies to a check

1879

Matthiessen v. London and County Bank.

which has a limit to its negotiability by the use of the words on it "not negotiable." The second part omits those words, and gives a protection to *bankers* with respect to checks crossed generally or specially, and without saying anything about the words "not negotiable." Had those two parts been different sections, and, instead of the word "but," had the figure 13 been there, marking the second branch of it as the 13th section, it does not seem to me possible that any one could have mistaken the meaning or application of the words in that last part. But then it is contended that, by the use of the word "but," the latter branch of the 12th section comes by way of a proviso to the first part; and that therefore it is to be read as if the words "not negotiable" were repeated in that latter part. That, to my mind, would be a strange stretch of language, and one which I would not assent to unless I saw some very imperative reason for it; such as, a manifest absurdity resulting from any other construction, which obliged one to import such words into the section; as, by so doing, one would be giving a forced meaning to the latter part of that section.

Now, do we require to give this forced meaning to the language by reason of the word "but" being employed? It seems to me that the word "but" can receive a very sufficient construction without giving such a forced meaning to the section. The first branch of the section refers to *any person*, the second branch refers to a *banker*. Therefore, the section, having in the first part given a protection to those who put upon their check the words "not negotiable," by which a person taking it shall not have or be capable of giving a better title to the check than that which the person had from whom he took it, goes on in the second part to give a banker a further protection, whether he is included in the word "person" or not; and a banker, if he has in good faith and without negligence received payment for a customer of a check crossed generally, or specially to himself, is not to incur any liability to the true owner of the check by reason only of having received such payment; the word "but" contradistinguishes "banker" from "any person." For what reason then, am I to construe the words there used against their obvious and plain meaning, and to import words providing for a different contingency, when, without repeating the words "not negotiable," the Legislature might have made it clear that this was what is intended, by simply inserting the words "such a check," or "so crossed," in the second part of that section? Am I to suppose the Legislature to have made a most singular blunder

and to have purposely expressed, and that too in very clear language, that which they did not mean? To give this part of the section the construction contended for by Mr. Waddy, I should be virtually making an enactment; for, I should be interpolating words in this second part of the section which do not occur, and which as it seems to me were intentionally omitted.

Is there, then, anything in the reason of the thing, viewing it with reference to the past law, which prevents my reading this enactment according to the plain and obvious meaning of the words themselves without either adding to or subtracting from them at all?

I do not wish to go through in detail the previous legislation. \*It has been carefully gone through by Mr. [15 Waddy, and comes substantially to this, that the Legislature has aimed at making certain limitations to the negotiability of checks; but the statutes have been so framed and carried into effect that, whatever may have been the intention of those who enacted them, they have done little, if anything, to restrict their negotiability. The case of *Belamy v. Majoribanks* (1) threw open what was supposed to be a limitation upon crossed checks; and the case of *Ogden v. Benas* (2) limited the protection to bankers given by 18 & 19 Vict. c. 59, s. 19, the effect of which, as construed by *Ogden v. Benas* (3), is, that the banker only upon whom the check is drawn which has a forged indorsement is protected against the consequence of his paying that check, and, as I understand it, upon the reason that, although a banker is bound to know the handwriting of his customer, he cannot know the handwriting of all the persons to whose order his customer may draw. It was supposed that that statute applied not merely to the banker upon whom the check is drawn, but to the collecting banker. But the case of *Ogden v. Benas* (4), followed by *Arnold v. Cheque Bank* (5), decided that it did not so apply. It is, therefore, not irrational to suppose that the Legislature by the recent act, 39 & 40 Vict. c. 81, s. 12, wished to give to collecting bankers the protection which it was supposed had been given by the previous statute; and there is nothing unreasonable in that section giving that protection; the more so as one object of the act could hardly be attained without it: see s. 7. The words are perfectly plain; and I see nothing in the previous history or law of crossed checks to make this construction

(1) 7 Ex., 889; 21 L. J. (Ex.), 70. (2) Law Rep., 9 O. P., 513; 10 Eng. R., 283.

(3) 1 C. P. D., 578; 18 Eng. R., 204.

of the section in any way doubtful or irrational. I am therefore of opinion that the demurrer must be overruled.

LINDLEY, J.: I take the same view of the construction of the act. The act is confined entirely to crossed checks; and the observations which I propose to make will also be confined to crossed checks; for, I purposely say nothing about uncrossed checks. The question is, what is the true construction of the act 39 & 40 \*Vict. c. 81. That act has done more things than one. It has said that, when a check is crossed it is to be paid through a banker, and through a banker only: and nobody can get the money except through a banker. That practically means this, that bankers must receive those checks and collect them for their customers. Take the position of a collecting bank. A collecting bank receives from its customers crossed checks: they must collect them or leave them alone: practically, of course, they do collect them. Then it comes to this,—what is the consequence if they do collect, and the customer who sends the check to them happens to have a bad title? It is, to my mind, a little hard in any case that a banker who merely collects the money for his customer should be liable for the money. I do not mean to say that, as the law stood before, the banker was not liable; but it is a little hard; and it appeared to me to be only reasonable, at all events, that the Legislature should relieve bankers from some of the consequences against which no amount of foresight could possibly guard. When we look at this 12th section, it is obvious that that is what is meant. The first part of the section merely affects the title of persons taking checks which are marked "not negotiable." This is a new fashioned check altogether; and the act of Parliament says that, if it is marked "not negotiable," the person who takes that check is to have no greater right than the person who gives it to him. The consequence of that is, that, in this particular case, the customers of the bank, Fowler and Wood, have no better title to the checks than the persons from whom they got them. That is the first part of the section. The second part of the section does not relate to checks, but to the proceeds of checks. The customer of the bank gets no better title than his transferrer, not only when the check is marked "not negotiable," but when it is not so marked, if it is not an open, but a crossed check. The bank in either case deals with the proceeds. If the bank has the check, it may be stopped in their hands. The customer gets no better title than the person from whom he took it. But, when the bank has got the proceeds, and the true owner says

to the bank, "Hand me those proceeds," the Legislature in the second part of the 12th section says "No; if you, the bank, have collected only the proceeds of the check for \*your customer, we will not render you responsible [17 for the proceeds when you have dealt with the check in the only way in which, as a matter of business, you could deal with it. If you have done anything more; if you have applied it to your own use, that is another matter; but, if you have simply collected it through the clearing house in the only way in which a banker collects checks, and that is all you have done, the true owner shall look through you to your customer, and he and not you must be responsible to the true owner for the proceeds."

That appears to me to be the true meaning of the language: and, when you come to look at the actual words, there is not a single word in the section that militates against that construction in the slightest degree, unless it be the word "but." That word "but" is far too loose a word to control the clear meaning of the latter part of the 12th section; and, for the reasons already given, it appears to me that the bank is right, and that the demurrer ought to be overruled.

*Demurrer overruled.*

Solicitors for plaintiffs: *Wilde, Barber & Browne.*

Solicitors for defendants: *Stevens & Harries.*

See 18 Eng. R., 215 note; 1 Thomp. National Bank Cases, 61 note.

The drawer of a check made payable to the order of the payee, is not bound by the payment thereof, by the bank, upon a forged indorsement of the name of the payee; it is bound, before payment, to ascertain the genuineness of the indorsement: *Welsh v. German Amer., etc.*, 73 N. Y., 424; *Thompson v. Bank, etc.*, 82 id., 1, affirming 45 N. Y. Super. Ct. R., 1; *Allen v. Trustees, etc.*, 17 Scot. L. Reporter, 447; *Hardy v. Chesapeake Bank*, 51 Md., 502; *Agricultural, etc., v. Federal, etc.*, 45 U. C. Q. B., 214.

The rightful possession of a check, made payable to the order of a particular person, confers no authority on the drawee to pay the same to the person having such possession, without the genuine indorsement of the payee: *Dodge v. National Exchange Bank*, 30 Ohio St. Rep., 1.

A clerk of the plaintiffs having received from certain of their debtors checks payable to their order, in pay-

ments of the amounts due, wrongfully and without authority indorsed on them the names of the plaintiffs and transferred them to other persons, appropriating the proceeds to his own use. Subsequently these checks were deposited with, and in good faith collected by, the defendant, and the proceeds thereof paid over to the depositors. In an action by the plaintiffs to recover the amount so collected, held, that they were entitled to recover: *Johnson v. First Nat. Bk.*, 6 Hun, 124, affirmed 68 N. Y., 616, following *Talbot v. Bank*, 1 Hill, 295.

Upon the trial plaintiffs produced a portion, but not all, of the checks received and collected by the defendant alleged to be forged. Held, that, as their inability to produce the others arose from the wrongful acts of the defendant, they were entitled to recover the whole amount collected: *Johnson v. First Nat. Bank*, 6 Hun, 124, affirmed 68 N. Y., 616, distinguishing *Van Alstyne v. Nat., etc.*, 4 Abb. App. Dec., 449, 7 Trans. App., 241.

1879

Matthiessen v. London and County Bank.

Where A. gives his check to B. for \$10, and B. raises that to \$100 by the addition of a cypher to the ten, and B. then deposits the check with his banker, and his banker in the due course of business collects the check from A.'s banker, each party has a reclamation against the other till it falls upon the party who is to blame in the transaction. The loss must fall finally upon the party who stands nearest in relation to the party who committed the offence.

Where a bank, by indorsing the draft which was raised by their depositor and deposited with them, gave it a credit upon which the plaintiffs paid, it was held, that there could be a recovery: *First National Bank, etc., v. The Third National, etc.*, 1 Chic. Law Jour., 524, Dist. Ct. U. S., North Dist. Ill., Blodgett, J.; *Louisiana Nat. Bank v. Citizens Bank*, 4 Am. Law Rec., 648, Sup., Ct. La.

If a person pays a promissory note through mistake, supposing the signature upon the note to be his genuine signature, he may, on discovering it to be forged, maintain an action to recover back the money paid, if he is not guilty of laches whereby the situation of the other party is changed to his injury: *Welch v. Goodwin*, 123 Mass., 71.

The indorser of a bill of exchange warrants his title; and if the indorsement by which he holds is a forgery, his indorsee can recover back the money paid him for the bill: *Williams v. Savings, etc.*, 57 Miss., 633.

A draft drawn by a New Jersey bank upon a New York bank, which had been altered by some unknown person by changing the date and name of payee and raising the amount, was presented at plaintiff's banking house by a stranger who applied for the money thereon. P., defendant's testator, came to the bank with the stranger and put his name upon the draft "as an indorser." Plaintiff purchased the draft and paid the amount of it to the stranger. The draft was sent by plaintiff to its correspondent in New York, and it was paid by the drawee, but upon discovery of the forgery the money was refunded. In an action upon the indorsement it was not denied that the person presenting the draft was the payee appearing upon its face at that time, and there was no

finding that he was not. Held, that as P. was to the knowledge of plaintiff simply an accommodation indorser, his indorsement was not a guaranty of the genuineness of the draft; that the forgery could not be presumed to be within his knowledge; that upon the facts found he had all the rights and privileges of an indorser, and was subject only to the obligations that relation imposed, and as he was not charged according to the law-merchant, i.e., by presentation for payment, refusal of non-payment, he was not liable: *Susquehanna Valley Bank v. Loomis*, 85 N. Y., 207.

The situation of a person to whom money is paid by mistake on a forged note is not changed by the fact that, on payment, he transfers to the payer a mortgage which he received as collateral security for the note, and which, with the note, he took in good faith, supposing the note to be genuine, the mortgage having been given as security for another note, of which the forged note was a copy: *Welch v. Goodwin*, 123 Mass., 71.

A depositor owes no duty to a bank requiring him to examine his pass-book or returned checks, with a view to the detection of forgeries in the indorsements; he has a right to assume that the bank, before paying his checks, will ascertain the genuineness of his indorsements: *Welsh v. German, etc.*, 73 N. Y., 424; *Thompson v. Bank, etc.*, 82 id., 1, affirming 45 N. Y. Super. Ct. R., 1; *Frank v. Chemical Bank*, 84 N. Y., 209, affirming 45 N. Y. Super. Ct. R., 452; *Agricultural, etc., v. Federal, etc.*, 45 U. C. Q. B., 214.

But see *Hardy v. Chesapeake Bank*, 51 Md., 562.

Though such a delay as allows the statute of limitations to run against a remedy over, may: *Thompson v. Bank, etc.*, 82 N. Y., 1, affirming 45 N. Y. Superior Ct. R., 1.

See also *Clark v. Mechanics, etc.*, 8 Daly, 481.

Banks have a right to expect their depositors to know and conform to the ordinary usages of business, and they may rely to a reasonable extent on the presumption that their customers deal with them accordingly.

A depositor, long after he had supposed he had withdrawn all his deposits, sued the bank for a balance which

the bank claimed he had drawn, and part of which had been paid out on checks signed by another person in his name. But it appeared that the depositor had been in the habit of checking out the whole of a deposit shortly after making it, and had neglected to present his bank book for balancing or to withdraw his checks. Held, that it was misleading to treat this as bearing only on the probabilities as to whether the third person who had signed the checks would have risked detection by acting without authority, and not upon the probabilities as to whether the depositor in checking out had overlooked comparatively large sums and failed to find it out, or whether he had authorized another to sign.

A depositor, who had been in the habit of checking out all his money shortly after he deposited it, was notified of a balance long after he supposed he had exhausted his account, and immediately withdrew it. He made no inquiry or objection, but sued the bank, nearly two years afterwards, for an alleged balance, including sums which had been paid out on checks signed by another in his name. The trial court charged that the bank had the burden of showing that these checks had been signed by authority. Held, that the depositor's course, in withdrawing the balance on notification of it, was a strong case of acquiescing in an account stated, which required him to bring himself within some rule that would allow him to impeach it, and that he had the burden of impeaching it: *Bank v. Busbey*, 45 Mich., 136.

A bank which pays out money on a check, purporting to be signed by a depositor, but the signature on which is in fact forged by his clerk, is not, in the absence of evidence that the clerk had, or was supposed by the bank to have, any authority to sign the depositor's name, exempt from liability to the depositor, by proof that the forgery was committed on a blank form taken from the depositor's check book, which was left lying about in his office during the day; that it was stamped with a hand stamp, sometimes used on his checks, and which was accessible to any one in the office; that the clerk was allowed to fill up checks, and was introduced by the depositor to the offi-

cers of the bank as the person who was authorized to receive money on the depositor's checks: *Mackintosh v. Elliot National, etc.*, 123 Mass., 393; *Hardy v. Chesapeake Bank*, 51 Md., 502.

The duty of the drawee, upon acceptance of such check, to pay the same only upon the genuine indorsement of the payee named therein, is not affected by a custom among bankers as to the mode of ascertaining the identity of the person indorsing the name of the payee and receiving payment. If the drawee relies upon false representations as to identity, for which neither the drawer nor payee are responsible, he makes payment to a wrong person at his peril: *Dodge v. National Exchange Bank*, 30 Ohio St. Rep., 1.

Where the drawee attempts to justify payment to a person not bearing the name of the payee, upon his unauthorized indorsement of the payee's name, on the ground that he was the person to whom the drawer intended payment to be made, though described by a false name; all the facts in regard to such intention being unknown to the drawee at the time of payment; he cannot be allowed to prove a portion of the facts occurring at the time of drawing the check, and to insist upon excluding other material facts occurring at the same time tending to disprove such intention: *Dodge v. National Exchange Bank*, 30 Ohio St. Rep., 1.

If a person presents a telegraph order for money to a bank, and represents himself to be the person named in the order, and a man of good character and standing identifies him as the person named in the dispatch, and indorses his signature to a receipt for the money as correct, the bank is not guilty of negligence in paying him the money, although it turns out that he is not the person named in the order: *Bank v. Western Union, etc.*, 52 Cal., 280.

Where an employe of a bank is authorized to certify a check, his certification binds the bank for its payment without regard to the state of the drawer's account.

Where the drawee or holder of a check procures its certification, it is, thenceforward, held at his risk, and the drawer is discharged from liability

thereon, as well as on the original consideration for which it was given: *French v. Irwin*, 4 *Baxter* (Tenn.), 401.

Where a certified check, which has been raised to a larger amount, is presented to the paying teller of the bank certifying it, who is asked if it is good, and he replies yes, upon which it is taken in good faith and for value, the certifying bank is bound to pay, notwithstanding such raising: *Clews v. New York, etc.*, 8 *Daly*, 476.

But see 18 *Eng. R.*, 220.

One receiving bank notes in payment of property, has the right, in case of failure of a previous failure of the bank, to return them, if he does so within a reasonable time: *Conor v. Merchants Bank*, 30 *U. C. Com. Pl.*, 380.

The holder of a bank check who receives from the bank, in payment of the check, a counterfeit United States Treasury note, can recover of the bank the amount of the note, provided he

offers to return it within a reasonable time after discovering the forgery: *Boyd v. Mexico, etc.*, 67 *Mo.*, 537; *McDonald v. Allen*, 8 *Baxter* (Tenn.), 446.

What is a reasonable time within which a counterfeit note should be returned, must necessarily depend on the situation of the parties and the facts and circumstances of each case, and is a question for the jury: *Boyd v. Mexico, etc.*, 67 *Mo.*, 537.

Where a check has been paid by the bank on which it was drawn, with funds of the drawer, the bank cannot, at the drawer's request, and without the holder's consent, by any act of its own, effect a rescission and imperil the rights of third parties who had acted upon the faith of a good check.

Proof of a custom where mistakes are made can avail nothing in a case where there is no proof of a mistake: *Albus v. Commercial, etc.*, 9 *Missouri App.*, 59.

[5 Common Pleas Division, 17.]

Nov. 28, 1879.

GODDEN V. CORSTEN.

*Practice—Claim—Credits—Particulars of—Order for.*

A plaintiff may be ordered to give particulars of items which are, in his claim, placed to the credit of the defendant.

APPEAL from chambers.

Writ indorsed with a claim upon an account for building some cottages according to contract.

In the account credit was given for two items thus set out: "Less, allowed from the said contract for work not performed, £61 10s. 10d." "Bricks, goods, and work, £180 2s. 11d."

The defendant, wishing to plead a set-off or counter-claim, applied to a master for an order on the plaintiff to give particulars of the credits. The master refused, but on appeal *Lopes, J.*, made the order.

18] \**Francis Turner*, for the plaintiff: It is a rule not to compel the plaintiff to state the items of sums for which he has voluntarily given credit to the defendant: *Myatt v. Green* ('). The Judicature Acts and Orders have not altered the former practice. This is not a case of a plaintiff seeking

(') 13 *M. & W.*, 377.



to sign judgment under Order XIV. There indorsement must, no doubt, be very specific, *Walker v. Hicks* (<sup>1</sup>), because, as Cockburn, C.J., said, "A party who is placed in the predicament of being liable to have judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist" (<sup>2</sup>).

The defendant cannot want particulars of credits except to take advantage of some slip in stating them. The details are within his own knowledge.

*English Harrison*, for the defendant, was not heard.

LORD COLERIDGE, C.J.: The old rule was made under a different system of pleading to that which now exists. The object of the new system is to give information on the pleadings, if an indorsement on writ, statement of claim, &c., may be so designated, and that everything stated by one litigant against the other should afford all the information to which he is fairly entitled for the purpose of stating his case. I think, therefore, that the Judicature Act, and the form of pleading sanctioned by it, have made the earlier decisions inapplicable, and without in the least degree questioning their perfect propriety at the time they were pronounced, I may say that they were given under a bygone system, and the principles which guided them no longer guide us. It is said in this case that the information sought by the defendant is apparently within his own knowledge, and that he does not want it. If it were so, and it were shown that the defendant was only desiring to trouble the plaintiff, there would be good reason for saying that he should not be enabled to do it. But here that is manifestly not the case. Here the credit being general and the items various, as bricks, work, &c., and the total put at a lump sum, it is evident that the defendant not only may not know but apparently does not know which of the items these credits are \*given for, still less does he know what particular [19 sums the plaintiff has allocated to separate items, and, if the defendant wants to plead payment or set-off, it is essential to the conduct of his case that he should know what items the plaintiff has given him credit for, as otherwise he would claim things for which the plaintiff, having withheld information, would at the trial declare that he had already given credit, and thereby seriously embarrass the defendant. No hardship is imposed on the plaintiff by making him bring out the credits into pounds, shillings, and pence, for he must know, and can easily state, how the specific sum for

(<sup>1</sup>) 3 Q. B. D., 8.

(<sup>2</sup>) 3 Q. B. D., at p. 9.

1879

Godden v. Corsten.

which he gives credit is made up, and, obviously, if the information were withheld, hardship might probably be caused to the defendant. No substantial reason is given why this information should not be supplied. It is said that it has not hitherto been given, and the practice is not overruled. But if we are to make a precedent I have no hesitation in making one. The defendant's request is reasonable, and one to which we ought to give our sanction. Therefore I am of opinion that the order of Lopes, J., ought to be affirmed.

LINDLEY, J.: I am of the same opinion. The defendant wants to plead a set-off or counter-claim, but does not want to do so in respect of matters for which the plaintiff has given credit. The plaintiff must know and ought to say for what sums he has given credit, as otherwise the defendant would be led into a pitfall.

*Motion dismissed with costs.*

Solicitor for plaintiff: *F. A. Cole.*

Solicitor for defendant: *J. Burton.*

See N. Y. Code of Civil Procedure, §531.

A court has power to require a plaintiff to furnish a bill of particulars when a party seeks to be fully apprised of the particulars, or circumstances of time and place of the matters set forth in his opponent's pleadings, though the requiring thereof is a matter of discretion for the court: *Tilton v. Beecher*, 59 N. Y., 176; *People v. Tweed*, 63 id., 194.

The office of a bill of particulars is to apprise parties of the items which the adverse party expects to prove, and to restrict the proofs to the matters specified: *Matthews v. Hubbard*, 47 N. Y., 428; *Butler v. Mann*, 9 Abb. N. C., 49; *Gee v. Chase*, etc., 12 Hun, 630; *Bangs v. Ocean*, etc., 53 How. Pr., 51.

A bill of particulars may be ordered or refused in *crim. con.*: *Tilton v. Beecher*, 59 N. Y., 176.

In libel and slander: *Corcoran v. Robb*, 8 U. C. Pr. Rep., 49; *Stiebeling v. Lockhaus*, 21 Hun, 457; *Jones v. Platt*, 60 How. Pr., 277.

See *Orvis v. Dana*, 1 Abb. N. C., 268, 6 Daly, 434.

In a suit for advertising in certain papers: *Clegg v. American Newspaper Union*, 7 Abb. N. C., 59.

As to documents in a party's posses-

sion: *Irish Society v. Commelin*, Irish Rep., 2 C. L., 501.

Under a plea of undue influence by "plaintiff and others in his interest": *Jackson v. Hillas*, Irish R., 4 Eq., 60.

In action for seduction: *Logan v. Gibson*, Irish R., 9 C. L., 507.

In suit for negligence: *McCabe v. Guinness*, Irish R., 9 C. L., 510.

But see *Bernhard v. Dyar*, 3 N. Y. Monthly L. Bull., 92, Com. Pl. Sp. T.

In an action by the attorney-general to recover moneys alleged to have been fraudulently obtained from a municipal corporation: *People v. Tweed*, 63 N. Y., 194; *Mayor v. Marriner*, 49 How. Pr., 36.

As to the links of a party's title in ejectment: *Kettlewell v. Dyson*, 9 Best & Smith, 300.

In actions of trespass or trover for goods: *Robinson v. Comer*, 13 Hun, 291.

See *Schile v. Brokhahne*, 41 N. Y. Super. Ct. R., 353.

Where an insurance company defended on ground assured falsely stated he had not applied to other companies and been refused, and that he had not had bronchitis or spitting of blood, to require statement of the companies to which it is claimed he had applied; and also of times and places at which defendant expected to prove assured had

had spitting of blood or bronchitis, though not of statements made by assured that he had had such troubles: *Dwight v. Germania, etc.*, 22 Hun, 167, 84 N. Y., 493.

Of the items for services for which defendant, an attorney, claimed to be entitled, under an agreement, to retain moneys collected for plaintiff: *Diossy v. Rust*, 46 N. Y. Super. Ct. R., 374.

Of items of account between broker and employer: *Miller v. Kent*, 60 How. Pr., 388.

Of particulars as to assets of a savings bank alleged to have been misappropriated by a director: *Friedberg v. Bates*, 3 N. Y. Monthly Law Bull., 4, 24 Hun, 375.

In an action for a conspiracy to withhold evidence, of the evidence claimed to have been withheld or concealed, if oral, the names and residences of the witnesses who would or should have testified, if documentary, the documents claimed to have been suppressed: *Leigh v. Atwater*, 2 Abb. N. C., 419.

Of payments by an executor or trustee: *Eberhardt v. Schuster*, 6 Abb. N. C., 141.

In actions sounding in tort, a bill of particulars will not be ordered except upon special circumstances being shown rendering the furnishing thereof necessary or proper, to prevent the party applying therefor from being surprised: *Joyce v. Hagaman*, 4 Irish Law Rec., 152; *Orvis v. Dana*, 1 Abb. N. C., 268, 6 Daly, 434.

A bill of particulars will not be ordered except under special circumstances in libel: *Orvis v. Dana*, 1 Abb. N. C., 268, 6 Daly, 434.

Nor after service of an account stated: *Hoff v. Pentz*, 1 Abb. N. C., 288.

In an action on the case for consequential injuries: *People v. Marquette*, 39 Mich., 437.

In a suit against physicians for incarcerating one in an insane asylum of acts referred to, on which they believed him to be insane: *Higenbotam v. Green*, 25 Hun, 214.

A bill of particulars will not ordinarily be required.

In actions for divorce: *Cardwell v. Cardwell*, 5 N. Y. Weekly Dig., 332, 12 Hun, 92.

Where the party applying for a bill of particulars is as well acquainted as the other party with the nature and particulars of the claim, and has all the knowledge necessary for him to prepare to meet the charges: *Powers v. Hughes*, 89 N. Y. Super. Ct. R., 482; *Wigand v. Dejonge*, 18 Hun, 405, 406; *Butler v. Mann*, 9 Abb. N. C., 49.

Though, in such cases, the answer to an allegation that the party applying is, "This is *petitio principii*. It assumes that the defendant has committed the acts with which he is charged, while the very question to be tried is whether or not he has committed them." *Friedberg v. Bates*, 3 N. Y. Monthly L. Bull., 4, affirmed 24 Hun, 375; *Tilton v. Beecher*, 59 N. Y., 190; *Mayor v. Marriner*, 49 How. Pr., 36.

Where the allegations as to special damages are so indefinite as not to entitle the party to prove the same, a bill of particulars thereof will not be ordered: *Stiebeling v. Lockhaus*, 21 Hun, 457..

See *Jones v. Platt*, 60 How. Pr., 277.

In an action for damage, a motion for a bill of particulars should not be granted when it substantially asks for the evidence of the plaintiff's special damage. That evidence may, in whole or in part, be acquired between the time of the motion and that of the trial, nor should plaintiff be required to spread his evidence before the defendant before the trial: *Dorley v. Royal, etc.*, 1 N. Y. Monthly L. Bulletin, 18.

Where a party, from loss of books or other cause, is unable to give a definite bill of particulars, but has furnished one as full as he can, the court may decline to order the service of a further bill, or that the party be precluded from giving evidence of the matters and things set out in the pleading or bill of particulars already furnished: *Smith v. Tonnelli*, City Court, Brooklyn, Jan'y, 1882.

The court said, "To preclude him (plaintiff) from giving evidence because, in consequence of the loss of the books of the vendees, or other causes, he cannot give the particular dates and amounts of sales, would be to deprive him of the right to a trial of his claim. He has given as full a description of his cause of action as he appears to be able to do."

On appeal to the Court of Appeals the appeal was dismissed, April, 1882.

See also *Chandler v. Stevens*, 2 N. Y. Monthly L. Bull., 5.

The addition of the words "per agreement" to the items of a bill of particulars does not preclude proving and recovering the value of the services specified in such bill, although an agreement for the payment of a specified sum be not proved: *Robinson v. Wiehl*, 45 N. Y., 810.

As to when a bill of particulars for moneys claimed to have been received by public officers and converted, is sufficiently definite and certain, see *People v. Cox*, 23 Hun, 269.

If a bill of particulars be too general, it may be stricken out, or the party obliged to furnish a new or further one: *Jones v. Platt*, 60 How. Pr., 277; *Gee v. Chase*, etc., 12 Hun, 632.

See *Stiebeling v. Lockhaus*, 21 Hun, 457; *Chandler v. Stevens*, 2 N. Y. Monthly L. Bull., 5; *Colwell v. Ludlam*, 1 id., 42.

When the party desires to preclude the proving of items not sufficiently stated in a bill of particulars, he should procure an order precluding the giving of evidence as to such items, because of a failure to furnish such bill of particulars: *Moore v. Bellim*, 42 N. Y. Super. Ct. R., 184; *Gross v. Clark*, 1 Civ. Proc. R., 464.

See also *Weller v. Weller*, 4 Hun, 195.

The court may properly order a complaint to be stricken out, or dismissed, as a penalty for a failure to comply with an order requiring the service of a bill of particulars: *Gross v. Clark*, 1 Civil Proc. Rep., 17, affirmed, *Id.*, 464.

[5 Common Pleas Division, 34.]

Dec. 18, 1879.

[IN THE COURT OF APPEAL.]

### 34] \*E. PELLAS & CO. V. THE NEPTUNE MARINE INSURANCE COMPANY (\*).

*Insurance (Marine)—Action by Assignee of Policy—Set-off by Insurers of Claims against Assured—Policies of Marine Insurance Act, 1868 (31 & 32 Vict. c. 86), s. 1—Rules of the Supreme Court, 1876, Order xix, rule 3—"Set-off"—"Counter-claim."*

In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set-off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment; for the claim under a policy for a loss is for unliquidated damages to which no set-off could be pleaded at law under the Statutes of Set-off in an action by the assured, nor in equity in a suit by the assignee, and therefore the debt incurred by the assured is not a "defence" open to the insurers under 31 & 32 Vict. c. 86, s. 1, that statute being intended merely to amend procedure and not to alter the rights of the parties to the policy; nor is the debt incurred by the assured the subject of "set-off" or "counter-claim" within the meaning of the Rules of the Supreme Court, Order xix, rule 3.

APPEAL by the plaintiffs from a decision of the Common Pleas Division discharging a rule for a new trial on the ground of misdirection (\*).

The facts are set out in the report of the proceedings before the Common Pleas Division (\*), and they may be shortly stated here as follows:

On the 7th of April, 1876, Harris & Co. effected with the defendants a policy of insurance for the sum of £300 on

(\*) Reversing 4 C. P. D., 139, *ante*, p. 443.

(\*) 4 C. P. D., 139.

a cargo of coals (with cash advances thereon) shipped on board the ship *Toivatar*, for a voyage from the Tyne to Genoa. On the 22d of May, 1876, the policy was assigned by Harris & Co. to Questa, of Genoa, and on the 30th of May, 1876, the policy was further assigned by Questa to Pastorino & Co., of Genoa, and on the 19th of May, 1877, the policy was assigned by Pastorino & Co. to the plaintiffs for the purpose of suing on it. The *Toivatar* during her voyage met with disasters, and did not reach her port of discharge until March, 1877. A notice of abandonment was given on the 12th of May, 1877, and was ultimately accepted by the defendants. Between the 1st of January and the 1st of February, \*1877, Harris & Co. became indebted to [35 the defendants in the sum of £40 for premiums on policies other than that sued on in this action. The defendants had no notice that the policy had been assigned by Harris & Co. until after the debt of £40 had been contracted. Harris & Co. filed a petition for liquidation on the 15th of February, 1877. The writ of summons was issued on the 24th of August, 1877. The defendants claimed to deduct this sum of £40 in an action by the plaintiffs to recover for a total loss (').

At the trial, Lord Coleridge, C.J., directed the jury to find for the defendants.

Nov. 20, 21. *Murphy*, Q.C., and *R. E. Webster*, Q.C., for the plaintiffs: The set-off, upon which the defendants rely, would, upon properly framed pleadings under the Supreme Court of Judicature Acts, 1873, 1875, be a good answer to a claim upon the policy, if Harris & Co. had not assigned it: the interest in it is, however, now vested in the plaintiffs, who are entitled to sue upon it in their own names by force of the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), s. 1<sup>(1)</sup>. The defendants contend that the debt owing to them from Harris may be set off against a portion of the money due upon the policy, and it must be admitted for the plaintiffs that if the words of the statute are read in their extreme literal sense they favor the con-

(<sup>1</sup>) The facts, as they appeared in the Court of Appeal, were slightly different from those stated in the judgment of the Common Pleas Division, 4 C. P. D., 141, *ante*, p. 445.

(<sup>2</sup>) By the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), s. 1, "Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy

to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make, if the said action had been brought in the name of the person by whom or for whose account the policy sued on was effected."

struction put upon them by the defendants' counsel; in that event the contention of the plaintiffs would be wrong, and the decision of the Common Pleas Division would be right. It is submitted, however, that the words of the statute must be interpreted with reference to their subject-matter 36] and with reference \*to the mischief which the Legislature intended to obviate; if the defendants' counsel are right, an insurance broker may still incur a debt with the underwriters upon the security of the money due upon the policy, although he has indorsed it away for full value. It is not disputed for the plaintiffs that after an assignment by the assured all defences arising upon the policy itself are open to the underwriters, but the set-off relied on is not a defence of that description. It is to be recollected that the Policies of Marine Assurance Act, 1868, was passed some years before the Supreme Court of Judicature Acts, 1873-75, and that previously to these statutes there could be no set-off to a claim for unliquidated damages; a claim upon a policy of marine insurance is a claim for unliquidated damages even after the loss has been adjusted: *Luckie v. Bushby* ('); 1 Arnould on Marine Insurance, p. 219 (5th ed.).

[*A. L. Smith*, for the defendants, admitted that a claim under a policy of marine insurance was a claim for unliquidated damages.]

It follows that before the Supreme Court of Judicature Acts, 1873-75, there could have been no set-off in an action upon the policy, even if Harris & Co. had not assigned it and had themselves sued upon it in their own name and for their own benefit.

[*PER CURIAM*: It is very clear that to a claim upon the policy by Harris & Co. there could be no set-off under the Statutes of Set-off, 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5.

*COTTON, L.J.*: In a suit in the Court of Chancery brought by the assignee of a policy of marine assurance against the underwriters a set-off would not be allowed, if it would not be a good defence in an action at law brought by the assignor, the original assured.]

If there could be no set-off in an action by Harris & Co., there could be none in an action by the plaintiffs, who are assignees. The Policies of Marine Assurance Act, 1868, was not intended to alter the rights of the parties to a policy: it dealt only with procedure.

[*A. L. Smith*, for the defendants, stated that he should 37] not \*contend that the set-off claimed by the defend-

(') 13 C. B., 864; 22 L. J. (C.P.), 220.

ants would have afforded a good answer to an action by the plaintiffs before the Supreme Court of Judicature Acts, 1873, 1875.]

Those statutes do not assist the argument for the defendants: they are not material to the question raised in the present action, which is based upon the Policies of Marine Assurance Act, 1868. The plaintiffs cannot succeed as assignees of a debt or chose in action pursuant to the Supreme Court of Judicature Act, 1873, s. 25, subs. 6, because the defendants have had no notice of the assignments: and this action cannot be regarded as a suit in equity by the assignees of a debt against the debtors, because the assignors are not parties to it<sup>(1)</sup>; at least, the plaintiffs could not obtain judgment without joining Harris & Co. either as plaintiffs or as defendants. The provisions, therefore, of the Supreme Court of Judicature Acts, 1873, 1875, are inapplicable for the purposes of the present case; and under no circumstances can the defendants deduct the £40 by way of counter-claim, under Rules of the Supreme Court, Order XIX, rule 3<sup>(2)</sup>: for by a counter-claim a defendant can set up demands against the plaintiff alone; but the claim of the defendants in the present action is against Harris & Co., and not against the plaintiffs. A counter-claim is in truth a cross-action between the parties to the suit in which it is pleaded. As this objection was not put forward on behalf of the plaintiffs at the trial, the defendants will be at liberty to amend their pleading in any way that they may think fit; but no amendment will enable them to raise a valid answer to the action.

\*The assignee of a debt or chose in action is not [38 affected by transactions between the assignor and the debtor after the assignment. Further, the loss occurred after the defendants had trusted Harris & Co. for the premiums on other policies. *Wilson v. Gabriel*<sup>(3)</sup> is not really against the plaintiffs: it was a case upon demurrer, and was evidently decided upon the ground that where a credit is run-

(1) See 1 Dan. Chan. Prac., chap. 5, s. 1, p. 177 (5th ed.); and see *Brice v. Bannister*, 3 Q. B. D., 569, per Lord Coleridge, C.J., at p. 573; 28 Eng. R., 459.

(2) By the Rules of the Supreme Court, Order XIX, rule 3, "a defendant in an action may set off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement

of claim in a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

(3) 4 B. & S., 243.

ning one party cannot get rid of a set-off by assigning away the debt due to him. *De Mattos v. Saunders* <sup>(1)</sup> is not in point, but it shows that an assignee may be able to enforce his claim, although the debtor might be able to rely upon a set-off if he were sued by the assignor.

Moreover, it is contended for the plaintiffs that the doctrine laid down in *Pickard v. Sears* <sup>(2)</sup> applies to the facts before the court, and that the defendants, having issued an instrument which the law allows to be assigned, must be taken to have contracted that no defence like that now relied upon shall be put forward. Upon this principle *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* <sup>(3)</sup>; *In re Blakely Ordnance Co., Ex parte New Zealand Banking Corporation* <sup>(4)</sup>; *Higgs v. Northern Assam Tea Co.* <sup>(5)</sup> were decided.

[COTTON, L.J.: In those cases the intention of the parties to create an assignable interest appeared more or less clearly upon the face of the documents themselves.

BRETT, L.J.: May not that argument be turned against the plaintiffs? Must they not be taken to have known that their immediate predecessors in title had been running a risk by not giving notice of the assignment to the defendants?]

It is not disputed that, as a general rule, the assignees of policies take them with all the equities attaching thereto, but this doctrine must be received with some limitation.

A. L. Smith, and Chalmers, for the defendants: Although formerly set-off could only take place between liquidated sums, yet that rule of law has been completely taken away by the Supreme Court of Judicature Acts, 1873, 1875. It may be correct that a counter-claim is merely a cross-action 39] between the same parties: \*it is nevertheless contended for the defendants that their claim against Harris & Co. is a set-off within the meaning of Rules of the Supreme Court, Order XIX, rule 3, which must be read together with the Policies of Marine Assurance Act, 1868.

[BRETT, L.J.: That construction of the rule does not accurately distinguish between "set-off" and "counter-claim;" surely those words confer definite and independent remedies upon a defendant against the plaintiff.

COTTON, L.J.: "Set-off" may in this rule perhaps mean not a mere defence to the action, but a cross-claim of such

<sup>(1)</sup> Law Rep., 7 C. P., 570.

<sup>(2)</sup> 6 Ad. & E., 469.

<sup>(3)</sup> Law Rep., 2 Ch., 391.

<sup>(4)</sup> Law Rep., 3 Ch., 154.

<sup>(5)</sup> Law Rep., 4 Ex., 387.



an amount as will entitle the defendant to judgment for some amount against the plaintiff.]

It is submitted that in that rule the term "set-off" allows a liquidated sum to be pleaded as an answer to an unliquidated claim.

Moreover, the defendants had no notice of the assignment by Harris & Co., and they cannot be deprived of their right of set-off because the debt due from them has been assigned: *Cavendish v. Geaves* (').

[BRAMWELL, L.J.: We fully agree with the principles laid down in that case; but the facts before us seem to go beyond them.]

It would be a hardship upon the defendants if they were not allowed to set off the £40; for if they had been aware of the assignment, they might not have given credit to Harris & Co.

*Murphy*, Q.C., did not reply.

*Cur. adv. vult.*

Dec. 18. BRAMWELL, L.J.: We are of opinion that the appeal must be allowed. The plaintiffs are the assignees of a policy of marine insurance, and they have brought an action on it against the defendants, who have pleaded a set-off founded upon a debt due to them from the original assured. The question is whether this is any defence in point of law, and we are of opinion that it is not. The defendants rely upon the last clause of s. 1 of 31 & 32 Vict. c. 86, and their defence is based upon the words "and the defendant in any action shall be entitled to make any defence \*which [40 he would have been entitled to make, if the said action had been brought in the name of the person by whom or for whose account the policy was effected." This is a statute relating to procedure only; and I do not think that such words as I have read can make any difference as to the rights of the parties in an act of Parliament relating to procedure. Without the aid of the statute the assignee might have sued at law in the name of the assured, and in a court of equity in his own name. The statute was passed because the Legislature wished to give the assignee a more convenient remedy, and intended that he should be in the same position as if he sued in a court of equity; no alteration in the rights of the parties was contemplated, and in equity I have high authority for saying that such a set-off as this would be no defence. The assignee would be allowed to sue in a court of equity in his own name, because there was a technical objection to his suing in his own name in a court

(') 24 Beav., 163.

1879

Pellas v. Neptune Marine Insurance Co.

of law, but in equity the underwriter would not be permitted to set up any defence which he could not plead in a court of law. At the time this act (31 & 32 Vict. c. 86) passed, this set-off would have been no defence either at law or in equity.

It has been argued that by Rules of the Supreme Court, 1875, Order XIX, rule 3, the set-off is admissible as a defence on the ground that that rule is to be read together with 31 & 32 Vict. c. 86, s. 1. The House of Lords<sup>(1)</sup> have decided that a general statute may repeal a particular statute: nevertheless I do not think that this rule alters 31 & 32 Vict. c. 86, which did not allow such an answer as this. The rule does not authorize a "defence" within the meaning of 31 & 32 Vict. c. 86. It is true that it speaks of "set-off" and "counter-claim," but these are different remedies from "set-off" under the statutes 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5. Under those statutes set-off never gave the defendant a judgment for any amount: he never could recover anything from the plaintiff. The former plea of set-off merely alleged that the plaintiff's claim did not over-top the defence. But the argument for the defendants was that whatever was a "defence" to a liquidated claim, has 41] been made by Order XIX, \*rule 3, a defence to an unliquidated claim. I cannot assent to that argument; according to it, if A. sues B. for damages for breaking his leg, B. may set up as a "defence" a claim against A. as the acceptor of a bill of exchange; is it possible to say that that can be deemed a "defence?" The rule does not authorize such an answer as this, and I am confirmed in this opinion by its concluding words, which allow a court or judge to refuse the defendant permission to avail himself of it. It is hardly to be supposed that this provision can refer to a defendant's right to defend himself. The orders and rules under the Supreme Court of Judicature Acts, 1873, 1875, are matters of procedure and are not intended to alter the law or the rights of the parties. If before those statutes the plaintiffs would have been entitled to maintain the action for the full amount from which the defendants seek to deduct £40, the plaintiffs can maintain it now.

BRETT and COTTON, L.JJ., concurred.

*Appeal allowed.*

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Shum, Crossman, Crossman & Pritchard*, for Turnbull & Tilly, West Hartlepool.

<sup>(1)</sup> It is presumed that Bramwell, L.J., was referring to *Garnett v. Bradley*, 3 App. Cas., 944.

[5 Common Pleas Division, 47.]

Nov. 13, 1879.

**\*SHEWARD and Another v. LORD LONSDALE.** [47]*Practice—Interrogatories—Relevancy and Materiality—Order xxxi, rules 8, 19.*

The plaintiffs claimed £1,732 10s., the price of three horses alleged to have been sold by them to the defendant. By his statement of defence the defendant denied that the horses were sold to him, and further alleged that the prices charged were excessive, and that the horses were ordered by his wife without any authority to pledge his credit for them. Reply, that the horses were necessities suitable to the estate and degree of the wife.

The following interrogatories were administered to the plaintiffs:

1. State the date when you purchased each of the horses alleged by you to have been sold to the defendant on, &c.
2. State, if you did in fact purchase each or any of the said horses, and were in fact the owner of the same, when, as you allege, you sold them to the defendant.
3. Give the exact amount you paid or had contracted to pay for each of the said horses.
4. If you were not the owners of the said horses or any of them at the date when, as you allege, you sold them to the defendant, state specifically and in detail how and under what circumstances you had each and every of the said horses in your custody, possession, or control.
5. State specifically and in detail the date or dates upon which you received the said horses into your control.

*Held*, that the 1st and 3d interrogatories were relevant and material to the issues, and ought to be answered; but that the 2d, 4th and 5th were inadmissible.

[5 Common Pleas Division, 50.]

Nov. 27, 1879.

**\*CORBET, Appellant; HAIGH, Respondent.** [50]

*Licensing Acts, 1872 (35 & 36 Vict. c. 94), s. 25, and 1874 (37 & 38 Vict. c. 49), s. 30—Supplying intoxicating Liquor during prohibited Hours—"Private Friends."*

P. gave a dinner to some friends at a licensed house kept by L. On the breaking up of P.'s party, L. invited nine of P.'s guests, including the appellant, to remain after the hour for closing, to partake of two bottles of claret at his (L.'s) expense. Upon an information charging these nine persons with being found on the premises during prohibited hours, the justices, though satisfied of the *bona fides* of the transaction, convicted them under s. 25 of the Licensing Act, 1872, on the ground that the landlord, on the arrival of the hour for closing, could not convert them into "private friends," for the purpose of their consuming the wine so supplied to them by him:

*Held*, that the conviction was right.

1879

Ford v. Drew.

[5 Common Pleas Division, 56.]

Nov. 21, 1879.

56]

\*CASTLE V. DOWNTON.

*Bill of Sale—Registration of—Affidavit—Description of Occupation of Grantor—Past Occupation—17 & 18 Vict. c. 36, s. 1.*

The affidavit filed with a registered bill of sale stated that the grantor "was until lately" a commercial traveller. It appeared that the grantor was a commercial traveller at the date of the execution of the bill of sale:

*Held*, that the description of his occupation was insufficient to satisfy the provisions of 17 & 18 Vict. c. 36, s. 1.

[5 Common Pleas Division, 59.]

Nov. 18, 1879.

59]

\*FORD, Appellant, v. DREW, Respondent.

*Parliament—County Vote—Freeholder—Residence—Absence during Service under Articles to a Solicitor—2 & 3 Wm. 4, c. 45, s. 31.*

By 2 & 3 Wm. 4, c. 45, s. 31, which makes provision for freeholders voting for a city being a county of itself, no freeholder shall be registered in any year "unless he shall have resided for six calendar months next previous" to a certain day in such year, within such city.

During part of the prescribed period of six months, a freeholder who had a bedroom kept for his exclusive use in his father's house within such a city was absent, serving under articles to a solicitor in London:

*Held*, that, being bound by the articles, he could not be deemed to have had either the liberty or intention to return to the room whenever he liked, and therefore had not "resided" within the city for the required time within the meaning of the act.

APPEAL from a decision of the revising barrister for the city and county of Exeter.

At a revision court the appellant duly objected to the name of the respondent being retained on the list of persons entitled to vote for the city of Exeter as the owner of a freehold rent-charge, upon the ground that the respondent had not resided for six calendar months previous to the 15th of July last within the said city, or within seven miles thereof.

He had previously lived at his father's house within seven miles of the city of Exeter, and a separate bedroom was set apart for his exclusive use in the house, and the same room continued to be set apart for his exclusive use, with the right to use it whenever he thought fit, and he always kept some of his clothes and other property in the room. In May, 1878, he went to London for the sole purpose of completing a term of service under articles to a solicitor there, and, sub-  
60] ject thereto, he always intended to and \*did continue

his said residence with the right to the said room in his father's house until the present time.

In August, 1878, the respondent returned to his father's house for three weeks' holiday. He then went back to London under the articles which expired on the 20th of January, 1879. On the 23d of January he returned to his father's house, and resided therein until after the 15th of July, 1879. He had no other home.

The revising barrister decided that the respondent had a residence within seven miles of Exeter, and had a right to reside there during six calendar months previous to the 15th of July, 1879, and that his residence was sufficient to satisfy 2 & 3 Wm. 4, c. 45, s. 31 ('), and the barrister retained the respondent's name on the list of voters. If the court should be of opinion that the decision was wrong, the name of the respondent was to be erased from the register.

*Bompas, Q.C.*, for the appellant: The residence of the respondent during part of the six months was in London and not in Exeter: *Whithorn v. Thomas* ('). The mere fact that he might have slept in the bedroom at his father's house was not enough. Of course if he had actually lived there, although occasionally absent during the period, that would have been sufficient: *Beal v. Fox* ('). But he did not in fact do so. The voter must not only have a place of residence which he may use, *Durant v. Carter* ('); *Ford v. Pye* ('); but be able to go to it: *Powell v. Guest* ('). There the claimant to vote had been imprisoned during part of the six months, and was therefore held not to have the necessary qualification. So in *Ford v. Hart* ('), where an officer away serving with his regiment had apartments reserved for him \*in his mother's house, the court held that, as he [61 was subject to the will and pleasure of the Queen, and therefore not *sui juris*, there could not be such an intention of returning as to constitute a constructive residence in the apartments. In *Taylor v. Overseers of St. Mary Abbott* ('), the claimant, who was engaged to attend on a gentleman during the day, was not bound to sleep in the house, but

(') 2 & 3 Wm. 4, c. 45, s. 31, provides that in every city or town being a county of itself, freeholders shall be entitled to vote at the election of members of Parliament, but that no freeholder shall be registered in any year, "unless he shall have resided for six calendar months next previous to the last day of July in such year, within such city or town, or within

seven statute miles thereof, or of any part thereof."

(<sup>2</sup>) 7 M. & G., 1.

(<sup>3</sup>) 3 C. P. D., 73.

(<sup>4</sup>) Law Rep., 9 C. P., 261.

(<sup>5</sup>) Law Rep., 9 C. P., 269.

(<sup>6</sup>) 18 C. B. (N.S.), 72; 34 L. J. (C.P.), 69.

(<sup>7</sup>) Law Rep., 9 C. P., 273.

(<sup>8</sup>) Law Rep., 6 C. P., 309.

1879

Ford v. Drew.

could, if he pleased, go home to his lodgings, and therefore had a residence there.

*Bucknill*, for the respondent: The case finds as a fact that, subject to the articles, "the respondent always intended to, and did, continue his residence with the right to the said room in his father's house." The respondent was *sui juris*, and could return when he liked. Suppose his father had lived in the neighborhood of London, and the son had every Saturday and Sunday slept in a bedroom kept for him at home, he surely would have had a residence there. Mere distance from London cannot make a difference. He might have travelled to Exeter after office hours on Saturday, and returned before the office opened again on Monday. In *Whithorn v. Thomas* (<sup>1</sup>), the residence was not *bona fide*, as Keating, J., pointed out in *Bond v. Overseers of St. George, Hanover Square* (<sup>2</sup>). In *Durant v. Carter* (<sup>3</sup>), the clergyman having given up his house to a substitute, could not return to it at will. So in *Ford v. Pye* (<sup>4</sup>). The officer in *Ford v. Hart* (<sup>5</sup>) was no longer *sui juris*, and had voluntarily incapacitated himself from returning to his mother's house at his own pleasure: see per Keating, J. The respondent had a dwelling at Exeter, and both liberty and the intention of returning to it. The requirements specified in *Bond v. Overseers of St. George, Hanover Square* (<sup>2</sup>), were therefore satisfied.

*Bompas*, Q. C., replied.

GROVE, J.: I am not free from doubt, but I think that on the facts as stated and the balance of authorities, the respondent had not a residence within seven miles of the city 62] of Exeter for the \*necessary six months prior to the 15th of July, 1879. He was articled to a solicitor in London during a part of the time. I do not think the length of that part, be it more or less, makes any difference, because we must ascertain whether there was such a break of residence as invalidated his qualification. The so-called residence within the seven miles was at his father's house, where he had a bedroom, "with the right to use it up to the present time whenever he thought fit," as the case states. I cannot, however, read the case as if it alleged an absolute legal right, so that if the father had placed a guest in the room the son could have turned him out; it was a right only by permission of the father. This fact is not altogether unimportant, because the result is that the son's residence would

(<sup>1</sup>) 7 M. & G., 1.

(<sup>2</sup>) Law Rep., 6 C. P., 312, at p. 313.

(<sup>3</sup>) Law Rep., 9 C. P., 261.

(<sup>4</sup>) Law Rep., 9 C. P., 269.

(<sup>5</sup>) Law Rep., 9 C. P., 273, at p. 275.

(<sup>6</sup>) Law Rep., 6 C. P., 312, at p. 314.

depend on two permissions: first, the continuance by the father of the permission to reside at his house, and, secondly, the continuance by the solicitor of the permission to absent himself from the office. I have not seen the articles, but assume them to have been in the usual form of contract which "must be a valid subsisting contract during the time it extends to (see *Ex parte Unthank* <sup>(1)</sup>) and bind the clerk for the full prescribed term to serve the master, and that master only, and only in his profession or business of an attorney or solicitor": Pulling's Law relating to Attorneys, 3d ed., p. 37.

As his father's house was in or near Exeter, it would have been practically impossible for the claimant to leave London while serving under the articles, except by going away on Saturday night and returning early on Monday morning, at great trouble and expense. That, indeed, he might do without the solicitor's leave. But he could not absent himself for a longer time. So that for five days, at least, of the week he had not the power of leaving without a breach of contract. Substantially, therefore, he was bound by his own agreement to serve the solicitor during office hours on the week days and not to absent himself. Could the simple possibility of his occasionally visiting his father at Exeter during the claimant's residence in London give him a "residence" in Exeter within the meaning of the act? No case cited is exactly in point. *Ford v. Hart* <sup>(2)</sup>, which, I observe, was argued on one side only, is the nearest, and is very similar to this, \*except that service in the army is [63 of a more compulsory nature than service with a solicitor, for an officer who deserts will be severely punished by military law. He cannot absent himself without the leave of his superior officer. What is the service of an articulated clerk to a solicitor? The clerk is bound by contract to remain, and does in fact remain with the solicitor during the agreed period, occasionally absenting himself by permission of his principal, and, without it, only once a week. The suggestion made by Erle, C.J., in *Powell v. Guest* <sup>(3)</sup>, that a man who is imprisoned for debt has not absolutely lost the liberty of returning to his place of residence, for by paying the debt he becomes free to return, was an *obiter dictum*. Much might be said for and against it. But even that is inapplicable to the present case, for there the debtor could, by paying the debt, release himself. There was a potentiality of returning. Here the articulated clerk could not return

<sup>(1)</sup> 2 M. & P., 453.

<sup>(2)</sup> Law Rep., 9 C. P., 273.

<sup>(3)</sup> 18 C. B. (N.S.) 72, at p. 81.

without the consent of the solicitor. Indeed, although a person may have a residence in two places, the articulated clerk cannot, I think, be said to have had his residence in a place which he could only occasionally visit, and where, even when he got there, his residence was only by consent of his father. I think that was not a residence within the plain intention and meaning of the statute. I am not free from doubt, but it arises more from expressions used in the cases upon the act than on my own construction of it. In the cases it is difficult to draw the line between constructive and actual residence. But if I had been asked to disregard the decisions, and say whether the articulated clerk resided in Exeter during the period in question, I should have said, without hesitation, No. The barrister might well have taken the contrary view, for the case is arguable, but I think that he was wrong.

LINDLEY, J.: I am of the same opinion. At first sight and until we look at the authorities, it seems clear that the claimant did not reside at Exeter for the six months necessary, although he did so for nearly the six months. How nearly, of course, cannot be considered. Then on what theory is he to be intended to have done that which he did [64] not actually do? How far is he to be treated \*as residing in Exeter when he was not actually residing there? In *Bond v. Overseers of St. George, Hanover Square* (<sup>1</sup>), Brett, J., cites a statement in Elliot on Registration, 2d ed., p. 204, as having been fully adopted by Erle, C.J., viz., "that in order to constitute residence a party must possess at least a sleeping apartment, but that an uninterrupted abiding at such dwelling is not requisite, and that absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence."

Let us see in what sense the present appellant was at liberty to return to Exeter. He had indeed physical liberty to return. But the distance between London and Exeter is such that, having regard to the obligation which he had entered into by his articles, he was not at liberty to return whenever he pleased. Consistently with his obligation he had not continued the residence at Exeter. Then had he the intention of returning? Are we to assume that he had an intention to break his contract? I apprehend that we are not. It would be contrary to every legal principle. He must be assumed to have intended to keep his contract, and

(<sup>1</sup>) Law Rep., 6 C. P., 312, at p. 314.



so, I think, he must be assumed not to have had the intention to return. Therefore, in my opinion, he had neither the liberty nor intention to return. The absence of both those essentials seems to me to dispose of the case.

As to the authorities. In *Ford v. Hart* (1) the inability to return was by reason of the respondent being an officer in the army, who therefore could not reside at his mother's house without the leave of his commanding officer. Brett, J., said (2): "When the person in fact lives elsewhere, and cannot, by law, return to the borough without permission of another, it seems to me impossible to say that there is an intention to return within the meaning of the terms as applied to the doctrine of constructive residence." What does that mean? "By law" there means by military law, according to which the officer absenting himself without leave could be arrested and taken back to his regiment. The liberty \*must be consistent with the duty. Counsel for [65 the respondent argued that he might break his contract and return to Exeter. But the *ratio decidendi* in *Taylor v. Overseers of St. Mary Abbott* (3), was that the attendant had not agreed to reside in the house of the gentleman whom he served during the day, and, consistently with his engagement, he might have resided every night with his wife at their own lodgings. Bovill, C.J. (4), lays stress on that fact, saying that the appellant "had not bound himself to sleep elsewhere." Here, I think, the respondent had bound himself to reside in London, or so near to his place of business that he could attend to his duties. Having regard to the facts and authorities, I think that the revising barrister's decision was wrong, and should be reversed.

*Appeal allowed, without costs.*

Solicitors for appellant: *Fox & Co.*

Solicitor for respondent: *S. D. Hamilton.*

(1) Law Rep., 9 C. P., 273.

(3) Law Rep., 6 C. P., 809.

(2) Law Rep., 9 C. P., at p. 276.

(4) At p. 811.

See McCrary on Election (2d ed.), §§ 34-46.

The constitutional provision that every person who shall have resided in the State, etc., shall be entitled to vote, means that he must have a permanent abode in the state, county, etc., in which he offers to vote, and hence there is no repugnancy between such provision and the election law as to the character of his residence: *Johnson v. People*, 94 Ills., 505.

Electors cannot be residents of one

district and at the same time be allowed to vote in another; and a law which transfers them from one district to another by a change of city boundaries, is as much an alteration of the district as it would be if the same result were brought about in a different way: *Attorney-General v. Holihan*, 29 Mich., 116.

Persons residing in the asylum for disabled soldiers at the time of an election, after the jurisdiction thereover had been restored to the State, and for the

year next preceding the election, are to be regarded as residents of Ohio for the entire year, within the meaning of § 1, Art. V, of the State constitution, notwithstanding the fact that part of the year transpired while the jurisdiction was in the United States: *Renner v. Bennett*, 21 Ohio St. R., 431.

An inmate of a county infirmary, who has adopted the township in which the infirmary is situated as his place of residence, having no family elsewhere, and who possesses the other qualifications required by law, is entitled to vote in the township in which such infirmary is situated. Such inmate is not under such legal restraint as to incapacitate him from adopting the township in which the infirmary is situated as his place of residence: *Sturgeon v. Korte*, 34 Ohio St. R., 525.

Where a person, about two months before an election, sells out his property and starts, with his family, for Texas, with the intention of locating there if he can find a place to suit him, but upon arriving there he returns without unloading his goods, to his former election precinct, he will not thereby lose his residence and right to vote. So, if a person in April moves, with his family, to the State of Ohio, where he remains a little over six months, renting and keeping house there about two months, and then returns in October of the same year, and he swears that it was not his intention to go to Ohio permanently, he will not lose his former residence under the election law: *Beardstown v. Virginia*, 81 Ill., 541.

A registered voter and qualified elector in this State does not, under the constitution of this State, lose his political domicile by a living in Washington City, attending to the duties of

a public office at that point, his family being at the same time on a visit to his father in the State of Massachusetts: *Dennis v. State of Florida*, 17 Fla., 339.

The "permanent abode" prescribed by the Revised Statutes of 1874, as the criterion of the residence required to constitute a legal voter, does not mean an abode which the party does not intend to abandon at any future time. In the sense of the statute, a "permanent abode" means more than a domicile, a house, which the party is at liberty to lease as interest or whim may dictate, but without any present intention to change it. The under graduates of a college, who are free from parental control, and regard the place where the college is situated as their home, having no other to which to return in case of sickness or domestic affliction, are as much entitled to vote as any other resident of the town pursuing his usual avocation. It is, *pro hac vice*, the house of such students—their permanent abode, in the sense of the statute.

As a general fact, however, under graduates of colleges are no more identified with residents of the town in which they are pursuing their studies than the merest stranger. Nor would the simple fact that such students paid a road tax in labor, while in attendance at the college, have any weight in determining the question of residence, the law under which such road labor was bestowed not requiring residence to render the party liable, but simply inhabitancy.

A party does not forfeit his residence in a precinct in which he was a voter, merely by becoming a county charge and an inmate of the poor house: *Dale v. Irwin*, 78 Ill., 170.

[5 Common Pleas Division, 109.]

March 11, 1880.

[IN THE COURT OF APPEAL.]

**\*THE YORKSHIRE BANKING COMPANY V. BEATSON [109  
and MYCOCK.**

**THE LEEDS AND COUNTY BANKING COMPANY V. BEATSON  
and MYCOCK (').**

*Partnership, Style of—Name of Individual Member—Signature to Bill of Exchange—  
Liability of Firm—Evidence.*

Where a signature is common to an individual and a firm of which the individual is a member, a *bona fide* holder for value, without notice whose paper it is, of a bill of exchange with such signature attached, has not an option to sue either the individual or the firm. But there is a presumption that the bill was given for the firm and is binding upon it, at least, where the individual carries on no business separate from the business of the firm of which he is a member: this presumption, however, may be rebutted by proof that the bill was signed not in the name of the partnership but of the individual for his private purposes, and is immaterial that the *bona fide* holder took the bill as the bill of the proprietors of the business carried on by the partnership whoever they might be, and not merely as the bill of the individual.

B. & M. carried on business in partnership. M. was a dormant partner, and B. was the only ostensible partner, the business being carried on in his name alone. B. entered into accommodation transactions for his private purposes, and, without the authority of M., accepted and indorsed bills of exchange in his own name only. B. in becoming party to these bills, did not intend to bind M., but he considered the bills as private transactions and signed them merely on his own behalf. The plaintiffs became *bona fide* holders for value of the bills signed by B., and took the bills as the bills of the proprietors of the business carried on by the partnership and not merely as the bills of B. Besides the business of the partnership B. was not engaged in any business:

*Held*, affirming the judgment of the Common Pleas Division, that the plaintiffs could not hold M. liable upon the bills accepted and indorsed by B.

In these actions the respective plaintiffs appealed against the judgment of Denman and Lopes, JJ., in favor of the defendants. It had been agreed that the second action should abide the event of the first.

The facts of the first action will be found fully stated in the report of the judgment pronounced in the Common Pleas Division (') and also in the judgment of this court.

Feb. 19, 20, 21, 23. *Bompas*, Q.C., and *J. Forbes*, for the plaintiffs.

*Waddy*, Q.C., and *Gainsford Bruce*, for the defendant *Mycock*.

\*The arguments in this court are sufficiently stated {110 in the judgment hereinafter set forth. The following authorities were referred to: *Sutton v. Gregory* ('); *Ex parte*

(') Affirming, *ante*, p. 498.

(') 4 C. P. D., 204, *ante*, p. 493.

(') Peake, Add. Ca., 150.

1880

Yorkshire Banking Company v. Beatson.

*Buckley, in re Clarke* (¹); *Lloyd v. Ashby* (²); *Smith v. Cra-ven* (³); *Ex parte Law, in re Bayley* (⁴); *Woodward v. Win-ship* (⁵); *Palmer v. Stephens* (⁶).

*Cur. adv. vult.*

March 11. The judgment of the Court (Bramwell, Bag-gallay, and Thesiger, L.JJ.,) was delivered by

THESIGER, L.J.: This is an action brought upon two bills of exchange of which the plaintiffs are the holders. The first is a bill for £276 15s., dated the 6th of March, 1878, drawn by R. R. Kelly & Co. upon and accepted by Messrs. J. & R. Wilson, payable to the order of the drawers four months after date, and bearing the successive indorsements, "R. R. Kelly & Co.," "Wm. Beatson," and "Josiah Carr & Son:" the second is a bill for £484 13s., dated the 13th March, 1878, drawn by Josiah Carr & Son, addressed, "Mr. William Beatson, Chemical Works, Rotherham," and accepted in the name "William Beatson," payable to the order of the drawers four months after date and indorsed by them. Both bills were discounted by the plaintiffs upon the 14th of March, 1878. The defendants to the action are Wm. Beatson and John Henry Mycock. The signature "Wm. Beatson" upon each of the bills was the signature of the defendant, Wm. Beatson. He has allowed judgment to go by default, and the action is defended by Mycock alone, who disputes his liability upon either of the bills.

The circumstances of the case are as follows: Beatson, for many years prior to December, 1877, carried on business as a chemical manufacturer at certain works at Rotherham. At the end of the year 1873 and beginning of the year 1874, the plaintiffs made inquiries as to Beatson's commercial position of Josiah Carr, who was bringing them paper for dis-111] count with Beatson's name \*upon it, and, the result of the inquiries being satisfactory, they discounted such paper. Beatson and Carr had some trade transactions to-gether, but apart from these trade transactions there was a series of accommodation transactions carried out by accom-modation bills between Beatson and the other parties to the bills now sued upon, including Carr himself, and these ac-commodation bills were from time to time renewed.

Down to the end of the year 1877, Beatson had no partner; but upon the 11th of December in that year, a deed of part-nership was entered into between him and the defendant Mycock. By its terms the partnership was to last for a

(¹) 14 M. & W., 469.

(²) 2 B. & Ad., 23.

(³) 1 C. & J., 500.

(⁴) 3 Deac., 541.

(⁵) 12 Pickering (Mass.), 430.

(⁶) 1 Denio (New York), 471.

period of five years with power of continuance, the value of the good-will of the business, the works and premises where the same was carried on, and the machinery, plant, and effects belonging to it, was estimated at £25,000, and Mycock was to purchase a one-fifth share of the business by the payment of the sum of £5,000. The business was to be carried on under the style of "William Beatson," the works and premises were to remain vested in Beatson who was to stand possessed of them for the purposes of the partnership, and the business was to be managed by Beatson, his partner not being required to attend to the business any further than he should think fit. By the 11th clause of the deed it was provided that neither of the partners, without the written consent of the other first obtained, should on the credit of the firm, make any payment, advance, or other application of the money or effects of the said partnership or in any manner engage or use the same, or the name or credit of the partnership firm, except on account and for the benefit of the partnership and in the usual manner of carrying on the business; and by the 12th clause it was provided that neither of the partners should lend or deliver upon credit any of the moneys or effects belonging to the partnership to any person whom the other partner should previously have forbidden to be trusted, nor without the previous consent in writing of the other partner would become bail, surety, or security with or for any person whomsoever, or make, give, draw, accept, or indorse any bond, bill, promissory note, or other instrument, or enter into any obligation or engagement or make any default, whereby the estate and effects of the partnership might be made liable for the \*payment or satisfaction of any sum of money, for which the partnership should not have received a full and sufficient consideration. [112

The object, with which Mycock entered into this partnership, was that of ultimately putting his son, who was then under age, into it, and, as a matter of fact, Mycock never interfered in any way with the management of the business, or occupied any other position or connection with it, than that of a dormant partner. Beatson concealed from him all information relating to his accommodation transactions, and for his frauds upon him in this and other matters connected with the inception of the partnership was ultimately prosecuted and convicted. The plaintiffs never knew of the partnership until July, 1878, at which date Beatson was a bankrupt.

For some time prior to the formation of the partnership Beatson had kept an account at the Sheffield and Rotherham Bank headed "William Beatson," and after the for-

1880

Yorkshire Banking Company v. Beatson.

mation of the partnership that account was continued without any change in its heading, and into that account Beatson paid all moneys whether moneys belonging to the partnership or his own private moneys, and upon it he drew, whether for the purposes of the business or his own private purposes. Beatson himself was called as a witness for the plaintiffs, and in addition to proving the facts already mentioned gave evidence to the effect that he kept two cash books, of which one was as he stated a private book kept as manager at the place of business, the other a partnership cash book; that in the former he did not enter cash received on account of the partnership, but that in the latter all business payments were entered. With reference to his bill accommodation transactions generally he stated that none of them were brought into the ledger either before the partnership or after, that the cash transactions relating to these accommodation bills were entered in the private cash book to which Mycock had no access, and were never put into the partnership cash book to which Mycock might have had access. With reference to his particular transactions with Josiah Carr he stated that all trade transactions between them were over before the partnership, and that as regards the particular bills sued on they were bills drawn for his and Carr's accommodation not for Mycock's, although he added [113] that they were in a degree for the business as \*one way of finding capital, and that without the bill transactions there was not capital enough to work the business. He admitted that Mycock found the £5,000 which he was to pay for his share in the business, that he never told Mycock that money was wanted, that he thought that he was not making Mycock liable for any of the accommodation bills whether renewals or otherwise, and that he considered them private transactions and did not enter them in the partnership books. He further said that he considered the bank book private, and that Mycock had left him to keep the banking account as he thought proper; that the proceeds of the accommodation bills were paid into the banking account, and that out of such proceeds goods supplied to the business and wages were sometimes paid. As regards the proceeds of the bills sued on, it appeared that a portion of them found their way into the banking account, but that upon the same day when this occurred Beatson drew out more than he paid in. On the part of Mycock an accountant was called who upon an examination of Beatson's books proved that apart from the accommodation bill transactions the business had during the period between the beginning of January and the end of

May, 1878, a cash balance to its credit, that the net result of the accommodation bills was to reduce the balance, and that Beatson had drawn out for his own purposes, independent of the business, about £4,000.

Upon these facts taken from the notes of Lindley, J., before whom with a jury the case was tried, that learned judge stated to the jury that the questions for them were, first: "Was the name (Wm. Beatson) put to the bills to denote the firm or to denote William Beatson?" Secondly, "Did the bank take the bills as the bills of the chemical works whoever the proprietors might be or as the bills of William Beatson only?" The jury retired and returning into court the foreman stated that as regards the bill for £484 13s., it having been drawn upon William Beatson at the Chemical Works, Rotherham, the jury agreed that William Beatson's acceptance of it must be held to denote the acceptance of the firm, but that as regards the other bill they found no evidence upon the point. Upon being asked by the learned judge to answer the question as regards that bill according to their judgment, the jury conferred again, and subsequently stated that \*from the fact of that bill being. [114 put in connection with the other they might take it as being the same thing, and to the second question they answered that the bank took the bills as the bills of the chemical works. Upon these findings a verdict and judgment was entered for the plaintiffs against the defendant Mycock. That judgment was subsequently set aside and judgment entered for Mycock by the Common Pleas Division upon the ground stated shortly that in a case where the name of an individual is the name also of a firm, and that name is put to a bill, the presumption is that the signature is the signature of the individual and not of the firm; that consequently it lay upon the plaintiffs in this case to displace the presumption by showing the signature to the bills sued upon were respectively the signatures of the firm, and that Beatson was authorized to use the firm's name on the particular occasions and for the particular purposes, in other words, that the bills were given for partnership objects and as partnership acts, and that the plaintiffs had failed to discharge the burden cast upon them<sup>(1)</sup>. Against the judgment of the Common Pleas Division the present appeal is brought.

In support of the appeal it is contended for the plaintiffs either, first, that where as in this case a signature is common to an individual and a firm, of which the individual is a member, it is open to the *bona fide* holder for value, without

<sup>(1)</sup> 4 C. P. D., 204, at p. 212; *ante*, p. 493, 500.

1880

Yorkshire Banking Company v. Beatson.

notice whose paper it is, of a bill with such signature upon it to sue either the individual or the firm; or, secondly, that if this option is not open to the holder, there is a presumption that the bill was given for the firm and is binding upon it, at least, where the individual carries on no business separate from the business of the firm of which he is a member.

As regards the first of these two contentions, we think that it is not a well-founded one. The only authoritative sanction to it, upon which the learned counsel for the plaintiffs rely, is a case of *McNair v. Fleming* which appears to have been decided in the House of Lords in 1812, but which is not reported otherwise than in Montagu on Partnership, vol. i, p. 37, and in the opinion of Lord Eldon, C., delivered in the House of Lords in the case of *Davison v. Robert-son* (\*), and which without further knowledge \*of the facts of the case, and the exact bearing of the judgment upon it, it is impossible to treat as an authority. Lord Eldon, indeed, does not quote it in support of so wide a proposition as that under consideration, but as bearing upon the proposition, that a joint adventure was as proper a partnership as any other, and one of the adventurers would be bound by the indorsement and acceptance of the other, a proposition which had been negatived by one of the interlocutors of the Scotch court finding that, whatever might be the case in a proper partnership, one person concerned in a joint adventure is not entitled by subscribing a firm to bind the other. While therefore there is really no authoritative sanction for this contention, there is abundance of authority against it in the numerous cases in the English and American courts, where the liability of partners upon a bill, signed in a name common to the firm and an individual member of it, has come under consideration and has been discussed, not upon the footing of any right of election on the part of the holder of the bill, but upon the particular circumstances of each case and the presumptions applicable to them, cases which we shall have to refer to more in detail in connection with the plaintiff's second contention. Apart too from authority, it appears to us manifestly contrary to true principles of law that the holder of a bill bearing upon it a name, which *prima facie* indicates an individual, and would naturally lead to credit being given to the individual alone, should, upon discovery and proof that there is a firm of which the individual is a member carrying on business under his name, have the right of going against the firm, al-

(\*) 3 Dow., 218, at p. 229.



though at the same time that the proof is given, it is proved also that the bill was signed by the individual for himself and not for his firm, and for considerations entirely unconnected with any partnership purpose.

The second contention made on behalf of the plaintiffs is one of more weight, and apart from the intrinsic importance of the question involved in it, there is an additional importance derived from the fact that, if the contention be correct, it at least displaces the ground upon which the judgment of the court below rests, although it will still remain to be considered whether the judgments may or not be rested upon another ground. As a matter of principle, there is considerable force in the arguments both for \*and against [116 the contention. Against it it is said that when a signature to a bill is of a name, which in itself and *prima facie* indicates an individual and would lead to credit being given to the individual, and the holder of the bill suing upon it is therefore compelled to give some proof that the name indicates a partnership, it is but just that he should be compelled to go the whole length of proving not only that a partnership existed under the particular name, and that the individual carried on no business separate from that carried on by the firm, but further that the bill was signed by the individual as a partnership act and for partnership objects. In support of the contention it is said that, inasmuch as a bill of exchange is ordinarily used as a trade instrument, there is a presumption that a bill having upon it a name common to the firm and to the individual is a trade bill, and therefore the bill of the firm, in a case where it is proved or admitted that there is no trading in the name except by the firm. In the absence of authority upon this question our opinion upon it would be in favor of the plaintiffs' contention. In point of convenience and expediency, and in the interests of trade, it has much to support it. The vast majority of bills given under the circumstances supposed would be really partnership bills, and yet it would be often difficult, if not impossible, for the holders of such bills to do more than prove that the only trade carried on under the individual name was the trade of a partnership, and if they were compelled to go further and prove that the particular bill was a partnership bill, the effect might be that in many cases dormant partners, and in some cases ostensible ones too, might escape from just liabilities. On the other hand the partners sought to be made responsible on the bills would in most instances be able to prove whether any particular bill sued on was or was not a partnership bill, and

should, as it appears to us, at least have the onus of doing so thrown upon them when it is through their own act, in allowing the firm name to be the same as that of an individual in the firm, that difficulty and doubt arise.

But in the court below it was considered that the American authorities clearly negative this view, and that the weight of English authorities is in favor of the American view of the law.

We propose to consider first the English authorities.

[17] \*In *Swan v. Steele* (1) two persons of the names of Wood and Payne were wholesale grocers in Liverpool trading under the firm of Wood & Payne, and also carried on under the same firm and at their counting house the business of buying and selling cotton. The defendant Steele was a dormant partner with them in the latter business. It was held that he was liable upon an indorsement in the firm name of a bill which had been paid to Wood & Payne for cotton sold by the firm, but which had been delivered by them to provide for an acceptance in the firm name for sugar supplied to the grocery business. It is difficult to see how the case could have been otherwise decided, for the bill sued upon was admittedly a bill in which Steele was interested as indorsee and holder with his partners, and consequently the indorsement over of that bill, although improper under the circumstances, was still manifestly an indorsement in fact by the partnership, of which Steele was a member. The evidence showed what the facts were, and the judgment of Lord Ellenborough assumed that the indorsement was in the name of the partnership of which Steele was a member, and upon that assumption decided that, in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. *Emly v. Lye* (2), which is commented on in the judgment of the court below as an authority in favor of the defendant upon the point under consideration, has really no bearing upon it. There, in an action upon several bills of exchange and for money had and received it was attempted to make the defendant liable either upon the bills or in respect of the money received upon the discount of the bills, which was applied to partnership purposes, where the signature upon the bills was not in the firm name, which was George Lye & Son, but in the name of E. L. Lye, which was the individual name of the partner signing. The counts upon the bills were upon the argument abandoned, as it was obvious, as Lord Ellenborough said in his judgment, that "on a bill of exchange drawn by one only it

(1) 7 East, 210.

(2) 15 East, 7.

cannot be allowed to supply by intentment the names of others in order to charge them ;” and it was held that, on the mere discount of the bill, no right could arise against the defendant by reason of the proceeds being used for partnership purposes ; in \*other words, that the transac- [118  
tion was nothing more than a purchase of the bills from the signing partner. The case of *Ex parte Bolitho* (1) is claimed as authority for the defendant. There Peter Blackburn was a secret partner in a business carried on by Isaac Blackburn in his own name, and was sought to be made liable as drawer in respect of bills drawn in the name of Isaac Blackburn by Isaac himself. Upon the affidavits it appeared that Peter Blackburn also carried on a separate business, and that after Isaac Blackburn had drawn and indorsed the bills, Peter Blackburn indorsed them also with his own hand for the purpose of getting them discounted. The Lord Chancellor stated that it was impossible for him upon the affidavits to decide between the parties, and that the case must be sent to a court of law for its determination, and he directed an issue whether the two Blackburns were jointly liable upon all or any of the bills. In the course of his judgment, however, he said : “ If money is advanced to A. and B., and the lender takes a bill from one of them only, he cannot maintain an action upon the bill against the two. Now, if A. and B. are partners and also separate traders, and A. draws a bill and indorses it in his own name, and B. also indorses it, and they become bankrupts, what is there to prevent the holder of a bill from proving against the separate estate of each of them ? And unless you can show that when A. drew the bill he drew it not as A., but as A. and B., there can be no legal contract upon the bill as against the two.” In these remarks of Lord Eldon the introduction of the element of separate trading by A. and B., and of the further element of both A. and B. putting their names to the bills so differs Lord Eldon’s supposed case from the case we are considering of a bill signed in a name common to a firm and an individual member of the firm, where there is no trading separate from the trading of the firm, and no signature to the bill but that of the common name, that *Ex parte Bolitho* (1) appears to us rather to support the contention of the plaintiffs’ counsel than to assist the defendant Mycock. The case of the *Bank of South Carolina v. Case* (2) was one in which three persons carried on business in partnership in England under the firm name of Crowder, Clough & Co. One of the partners, J. B. Clough, was

(1) 1 Buck’s B. C., 100.

(2) 8 B. &amp; C., 427.

119] \*sent out to America to form a branch house, which he did form under his own individual name. He was restricted under the partnership articles from transacting any business in America, except on the partnership account, and, as a matter of fact, as appears from the report, p. 432, he had no individual business, and the name of J. B. Clough was never used by him in trade or in drawing, indorsing, or accepting or negotiating bills of exchange, except for the benefit and on account of the partnership. Under these circumstances it was held that all the partners were liable as indorsees in respect of certain bills indorsed by Clough in the name of J. B. Clough, and which were connected with partnership transactions, although Clough in indorsing them disregarded certain specific instructions given him by his partners, and exceeded his authority. It is unnecessary to discuss whether the doubts raised by Crompton, J., in *Nicholson v. Ricketts* (\*) as to the correctness of this decision are or are not well founded. It is sufficient for our present purpose to say that the decision proceeded upon all the facts of the case, and not upon any doctrine as to presumption or burden of proof. But the case of *Furze v. Sharwood* (†) is a distinct authority upon the point under consideration. There a business was carried on by trustees for creditors in the name of Samuel Maine, one of the persons who had previously carried it on in partnership. Maine had also for a time a separate business of his own. The plaintiff had discounted bills for the old partnership, and also had been accustomed to lend Maine money for the purposes of his private business. Maine after a time sold his separate business and ceased to carry it on, and having subsequently indorsed bills in the name "Samuel Maine," one of which had been discounted by the plaintiff and was sued on, and the proceeds of which were placed to his credit at his bankers, and were drawn upon indiscriminately for the purposes of the business, in which he was agent, and for his own private purposes, the trustees were held liable as indorsers, and Lord Denman, C.J., in delivering the judgment of the court, said, p. 418: "*Prima facie*, therefore, the signature 'Samuel Maine' was their signature, and they would be bound by it. But it is said that Maine carried on a separate business 120] of his own, \*and that the plaintiff was bound to show that the indorsements in question were on account of the business of the trustees, and not in his separate business. Now, it appears that the bills were discounted with persons who were in the habit of discounting for the former firm,

(\*) 2 E. &amp; E., 497; 29 L. J. (Q.B.), 55.

(†) 2 Q. B., 388.

who assigned their effects to the defendants as trustees; and, moreover, that the bills in question were not discounted till after Maine had ceased to carry on his separate business. Under these circumstances we think that the onus of showing that the indorsements were made on account of the separate business, and not on that of the trustees, which was the general and ostensible business, lay on the defendants. Several cases were cited which it is not necessary minutely to examine; it is sufficient to say that they are not inconsistent with this view of the present case. We are, therefore, of opinion that the defendants were bound by the indorsement of Maine, and that the plaintiff, on this ground of objection, would be entitled to our judgment." This decision is in no way shaken by that in *Nicholson v. Ricketts* (\*), where two firms with distinct trade names agreed to carry on joint exchange operations under such circumstances as to make them partners in them, and it was held that the signature to bills of one of the two firms drawn in the course of the exchange operations did not make both firms liable as drawers; for the decision proceeded simply on the ground that by the arrangements between the two firms the names of the two firms were to be used separately, the paper to be dealt in being drawn by one firm and accepted by the other (\*); and, as Cockburn, C.J., said at p. 523, it did not appear that the drawing firm had any authority, express or implied, to bind the defendants by drawing bills. The case of *In re Adanson Fibre Co., Miles's Claim* (\*), was substantially the same as that of *Nicholson v. Ricketts* (\*), and was decided upon the same considerations. In each of these cases the court came to the conclusion, as a matter of fact, upon all the circumstances before it, that the name on the bill was not intended to be, and was not, the name of the partnership sought to be made liable upon it.

Upon this review of English authorities they appear to support \*the view that where a name is common to a [121] firm and to an individual member of such firm and the individual member carries on no business separate from that of the firm, there is a presumption that a bill of exchange drawn, accepted, or indorsed, in the common name is a bill drawn, accepted, or indorsed, for the partnership and for which the partnership is liable, and that it lies upon the defendants in an action against the partners upon such bill to get rid of the *prima facie* case made against them. But, as the court below relies much upon the American authorities

(\*) 2 E. &amp; E., 497; 29 L. J. (Q.B.), 55.

(\*) Per Crompton, J., 527.

(\*) Law Rep., 9 Ch., 635; 10 Eng. R., 634.

1880

Yorkshire Banking Company v. Beatson.

as uniformly negating this view, and those authorities have been much discussed in the argument before this court, we think it desirable to refer to them.

The authorities specially cited in the judgment of the court below are *Parsons on Bills of Exchange*, p. 131; *Story on Partnership*, pp. 106, 142; the decision in the Supreme Court of New York of *Oliphant v. Mathews* <sup>(1)</sup>; and the direction of Story, J., to the jury in *United States Bank v. Binney* <sup>(2)</sup>. The passage referred to in *Parsons* does not bear out the proposition for which it is cited. He says, "The burden of proof is upon the plaintiff to show that the paper was given in the business and for the use of the firm; for it will be intended *prima facie* to have been given in the separate business of the partner signing it and to be binding upon him alone, at least if he is also engaged in business on his own separate account." The views of Story, J., are best to be taken from his ruling in *United States Bank v. Binney* <sup>(3)</sup>. There in directing the jury he used this language: "In the present case the signature of John Winship may be on his own individual account as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof then is upon the plaintiffs to establish that it is a contract of the firm and ought to bind them." But there was evidence to go to the jury in that case, that the partnership was limited to a soap and candle business, and that the accommodation notes which were sued on were given in respect of consignments of meat, which might have constituted, and it was contended did constitute, the separate business of Winship. It is doubtful, therefore, whether Story, J., intended his [22] proposition to extend to \*a case where no separate business could even be suggested as existing. On the other hand, in the case of *Mifflin v. Smith* <sup>(4)</sup>, Rogers, J., dealt with the doctrine of presumption in a case where the question was whether a loan of money, obtained by a member of a partnership carried on in his individual name, was obtained on the faith of the partnership business or on the credit of private speculations of the individual partner, and he laid it down that the presumption was that it was made on the faith and credit of the business, saying, "If a retail merchant gets a note discounted, is it not to be presumed to be in the regular prosecution of his business?" and adding, "The difficulty arises from the name of the individual and the name of the firm being the same. That is the presumption, liable, how-

<sup>(1)</sup> 16 Barbour, 608.

<sup>(2)</sup> 5 Mason, 176, 184.

<sup>(3)</sup> 17 Sergeant & Rawle (Pennsylvania), 165.

ever, to be rebutted if the jury believe from the evidence that was not the state of the fact." A motion to the Supreme Court of Pennsylvania, founded amongst other things upon the alleged errors of this direction, was refused. This case was decided in 1828. The case before Story, J., was in 1828. In 1845, the question under consideration again arose in the Supreme Court of New York in the case of the *Bank of Rochester v. Monteath* (<sup>1</sup>), where the name of William Monteath, an agent of a firm, had been used as the firm name, and the court said: "If William Monteath had also been in business on his own account, then the acceptance by writing his name on the face of the bills would have been an equivocal act, and it would have been necessary to show that he accepted on account of the partnership and not in his own private business:" and after citing among the authorities for this proposition the *United States Bank v. Binney* (<sup>2</sup>), thus indicating that they must have thought that in that case there was a separate business carried on by the individual whose name was used, the court added: "But there was no evidence that William Monteath was engaged in any other business than the affairs of this partnership. We must then regard these bills as drawn on and accepted by the house doing business in the name of William Monteath." In 1853 was decided, also in the Supreme Court of New York, the case of *Oliphant v. Mathews* (<sup>3</sup>), \*which is the second [123 of the two cases cited in the judgment of the court below. That case, when critically examined, will be found not to be inconsistent with the cases of *Mifflin v. Smith* (<sup>4</sup>) and the *Bank of Rochester v. Monteath* (<sup>1</sup>). It is true that the court laid down in general terms that where a partnership is carried on in the name of an individual, and a suit is brought against the partners upon a note or other obligation signed by such individual, the legal presumption is that it is the note of the individual and not of the partners; but the court immediately qualified the generality of the proposition laid down, by saying that the presumption might be repelled and overcome (in other words the onus of proof might be shifted) by proof as to the business in which such person was engaged, and while citing *Mifflin v. Smith* (<sup>4</sup>), as explaining what proof would be sufficient, the court pointed out that in the case before them it was proved that the individual did business and borrowed money on his own account as well as on account of the partnership, and it was not shown that one was not constant and regular as the other. This case,

(<sup>1</sup>) 1 Denio, 402.(<sup>2</sup>) 5 Mason, 176.(<sup>3</sup>) 16 Barbour, 608.(<sup>4</sup>) 17 Serg. & Rawle (Penn.), 165.

1880

Yorkshire Banking Company v. Beatson.

therefore, is in no way inconsistent with the previous case decided in the same court of the *Bank of Rochester v. Monteath* (<sup>1</sup>), and none of the other cases cited in the argument before us carry the doctrine of presumption in favor of the defendant further. It appears to us, therefore, that the American authorities are in accord with the English upon the point under consideration, and that both fail to support the view taken by the court below, and are in favor of the second contention urged in this case on behalf of the plaintiffs.

Applying then the presumption for which the plaintiffs contend to the circumstances of the present case, the matter stands thus. The only business carried on in the year 1878 in the name of and by William Beatson was the business of the partnership, and both the bills sued upon have the appearance of trade bills. *Prima facie*, then, the bills were bills indorsed and accepted respectively in the name and on account of the partnership; and if that *prima facie* case were not displaced, Mycock would be liable upon them to the plaintiffs as *bona fide* holders for value without notice, even though they were so indorsed and accepted for private [24] purposes of \*Beatson and in fraud of his partner. The nature of the partnership business was such as to give Beatson in respect to persons dealing with him in business an implied authority to bind his partner by bills of exchange, and his partner, although a secret one, must be held responsible upon any bill signed by Beatson in the name of the firm in favor of a holder whose title cannot be impeached, however much Beatson in signing that name may have exceeded the authority and broken the trust reposed in him by the agreement of partnership. As was said by the court in giving judgment in the case of *Wintle v. Crowther* (<sup>2</sup>), "Where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached," and the authorities generally both English and American are uniform in support of this view. There is no difference in this respect between the dormant and the ostensible partner, and when once it is established that a name common to a firm and an individual member of it has been put to a bill as the name of the firm, there is no difference between the liability of partners carrying on business in such a name and the liability of partners carrying on business in a name which bears in itself the stamp

(<sup>1</sup>) 1 Denio, 402.(<sup>2</sup>) 1 C. & J., 316, at p. 318.



and evidence of a partnership. It may perhaps be argued that in the latter case the *bona fide* holder without notice is induced by the name itself to trust a firm, and is therefore entitled to have the responsibility of all the members of that firm, while an individual name would suggest no responsibility other than that of the individual whose name it is; but when it is remembered that firm names are often used by individual traders while individual names are often used by firms, the argument practically comes to nothing, and a common principle applicable to both cases remains alone consistent with mercantile expediency and general law.

But assuming that there is no difference as matter of law between the two cases, there is as a matter of evidence a very real and very practical difference. A name in itself indicating a firm does not, except in rare instances of which the case of *Stephens v. Reynolds* (1) is an example, leave open any doubt as to the meaning of a signature in such [125 name; but a name which in itself indicates an individual is, notwithstanding the effect of any legal presumption, ambiguous, and there are likely to be few if any cases where the decision of the jury or of a court will be rested upon the presumption alone. The present case is no exception to the rule, and the presumption in favor of the plaintiffs arising from the fact, that Beatson carried on no business separate from that of the partnership, sinks into comparative insignificance by the side of the additional facts which are proved in the case. Upon those facts we have to decide, as the courts in *Nicholson v. Ricketts* (2), and *In re Adanson's Fibre Co., Miles's Case* (3), were called upon to decide, whether the signature to the bills, upon which the dispute arises, was intended to denote and did denote the partnership of which the defendant was a member. In the first place, it is clear that the bills were bills which, if signed by Beatson for the partnership, were so signed by him without the authority and in fraud of his partner, and in respect of which no action would have lain against Mycock if they had remained in the hands of Josiah Carr & Son, who took them with notice. In the second place it is, we think, equally clear that as between Beatson and Mycock the bills were not treated as having been signed by Beatson on partnership account. They were not entered in any partnership book; and indeed, even before the partnership as well as after it commenced, the accommodation transactions of Beatson were treated as not forming any part of the transactions of his business, and were excluded from the ledger. In the

(1) 5 H. & N., 513. (2) 2 E. & E., 497. (3) Law Rep., 9 Ch., 635; 10 Eng. R., 634.

1880

Yorkshire Banking Company v. Beatson.

third place, the evidence establishes that the accommodation transactions of Beatson, after the commencement of the partnership, diminished rather than added anything even temporarily to the capital of the firm; and lastly, Beatson himself, called as a witness by the plaintiffs themselves, disproved, as it appears to us, the fact that in signing the bills in question he signed for the partnership. He stated that he thought he was not making Mycock liable for any of the accommodation bills whether renewals or otherwise, and that he considered them private transactions, and did not enter them in the partnership books. Can any inference be [126] reasonably drawn from such evidence \*than that Beatson in signing the bills intended to sign and did sign them for himself? We think that no other inference ought to be drawn, and that the jury in finding that the signature "William Beatson" upon each of the bills was intended to denote the firm, gave a verdict against the evidence and one which ought not to stand. The reason given in support of their finding by the jury, that the one bill was addressed to the drawee or drawees as of the Chemical Works, Rotherham, and that the other was so connected with it as to stand or fall with it, might have been a good reason in a case where the evidence was in other respects doubtful, but is in the present case met to some extent by the very form of the bill itself, which, while addressed to the drawee or drawees at the partnership works, contains in the term "Mister," prefixed to the name Wm. Beatson, an indication that the individual and not the firm was intended, and is entirely outweighed by the clear evidence to which we have referred; and we understand that the learned judge who tried the case was himself dissatisfied with the finding. The additional finding that the bank took the bills as the bills of the chemical works is clearly irrelevant, if the former finding is wrong; for, if the bills were in fact signed not in the name of the partnership but of William Beatson individually and for his private purposes, the fact that the plaintiffs, who were unaware that Mycock was a partner with Beatson, and never advanced any money on the faith of his credit, did at the same time give credit to the name of Beatson as being the name of the owner of the chemical works, can give them no more right against Mycock than if he had been a mortgagee of the works instead of a partner in them. The law by express enactment in the case of bankruptcy asserts a title in favor of the general body of creditors of a bankrupt to property, of which he may have been at the time of his bankruptcy in apparent possession with the consent of the

true owner, and upon the faith of which he gained a false credit. But in actions founded upon purely personal contracts, the law does not recognize the mere moral right which a creditor may attempt to assert against one person in consequence of his having intrusted to another property, in the belief of his ownership of which the creditor may have contracted with him; in other words, in a case like the present \*there is no conduct on the part of the dormant part- [127 ner which makes it inequitable on his part to deny or estop him from denying his liability upon a contract to which he was in fact no party, from which he has derived no benefit, and in respect of which he was not held out to the person suing him as liable. As regards this point nothing turns on the subject-matter of the action being negotiable instruments. Beatson by giving the use of his name to a partnership, of which he was a member and the only ostensible member, did not preclude himself from making contracts binding himself alone, and in any contract *de facto* made by him whether by parol or in writing the question, the answer to which would determine Mycock's liability or freedom from liability, would not be whether the other contracting party trusted Beatson because he supposed him to be sole owner of the chemical works, but whether Beatson, whom alone he knew and actually trusted, was acting as agent for the partnership or in his individual capacity for himself. This kind of question was raised in the case of the *Bank of Scotland v. Watson* ('), where the bank and its agent carried on separate banking businesses at the same office, and the bank was unsuccessfully sued by a person who relied, in support of his claim against the bank, upon a receipt which bore the address of the common office.

One point only remains for decision. The verdict and judgment for the plaintiffs have been properly set aside by the court below, but is it right that the judgment entered instead for the defendant Mycock should stand? We have entertained some doubt whether the case ought not to go to another jury to be decided upon the principles laid down in this judgment, but we have come to the conclusion that the court ought not to put the parties to this expense. The case is one in which no additional facts remain to be proved, and in which upon the facts proved no jury would be justified in finding a verdict adverse to the defendant Mycock. It is one, therefore, in which, to use the words of Rule 10 of Order XL of the General Rules of the Supreme Court, we have before us, as the court below had, all the materials

(') 1 Dow., 40.

1880

Yorkshire Banking Company v. Beatson.

necessary for finally determining the question in dispute; and in this state of circumstances we think that the judgment of the court \*below should stand, and that the appeal should consequently be dismissed.

*Judgment affirmed.*

Solicitors for plaintiffs: *Jacobs & Vincent.*

Solicitors for defendants: *Learoyd & Co.*

See *ante*, p. 493, 501-2 note.

Upon the dissolution of a firm by the death of one partner, the surviving partner has no power to assign or pledge the uncollected and undivided assets of the firm, consisting of choses in action due to it, as collateral security for his own pre-existing debt, so as to give his assignee a right superior to the equity of the personal representative of the deceased partner to have the assets applied to the debts of the firm: *Allen, etc., v. National Bank, 5 Lea (Tenn.), 558.*

A firm dissolved after ordering a lot of merchandise, but it was all forwarded before the assignors knew of the dissolution, and after they learned of it, they took a note, made in the firm name by the remaining partner, for the amount due. They afterwards brought suit against both partners on the common counts and on the note. Held (1), that the retiring partner could not be held upon the note, against his objection, as after the dissolution the other could not bind him; but (2), that an action on the common count for goods sold and delivered would lie against both for the debt.

Where a firm agreed to settle for merchandise with a note, and after dissolution a partnership note is given by the remaining partner, the other can repudiate his liability thereon, and if he is released, the vendor can treat the note as different from that agreed on, and it cannot then be regarded as payment: *Goodspeed v. South End, etc., 45 Mich., 237.*

A retiring partner is bound by all previous contracts made within the line of the business; but after the dissolution of the partnership he is not bound by any new contract made by his former partner.

An order for goods does not amount to a contract binding the person who gives it, until some act is done on the faith of it by the person to whom it is given, or until it is accepted; and if it is above \$50, the acceptance, in Michigan, must be in writing.

Where goods are ordered by one member of a firm, and the order has not been accepted, nor the goods shipped until after notice of its dissolution, and the shipment varies from the terms of the order, the retiring partner will not be bound by it.

If the conditions of an order given by a firm are waived, after the dissolution of the partnership, by the remaining partner, it will not bind the retiring partner: *Goodspeed v. Wiard Plow Co., 45 Mich., 322.*

An ex-partner in a dissolved firm cannot, without express authority from his former copartners, indorse, in the name of the firm, a promissory note made payable to the firm.

*Semble*, that if the maker of a promissory note, in favor of a firm already dissolved, knew of the dissolution of the firm at the time of making the note, he cannot afterwards avail himself of the prior dissolution of the firm as a defence to an action on the note: *Paterson v. Hughes, 2 Victorian Rep. (Law), 148.*

[5 Common Pleas Division, 128.]

March 19, 1880.

[IN THE COURT OF APPEAL.]

DAVIS V. GOODMAN and Another.

*Bill of Sale—Attestation by Solicitor—Void as between Grantor and Grantee—41 & 42 Vict. c. 81.*

A bill of sale to which the Bills of Sale Act, 1878 (41 & 42 Vict. c. 81), applies, if it be not explained to the grantor and attested by a solicitor in compliance with ss. 8 and 10, is not void as between the grantor and grantee:

So held, overruling the judgment of the Common Pleas Division.

APPEAL from the judgment of the Common Pleas Division in favor of the defendants (').

*Gore*, for the plaintiff.

*Bompas*, Q.C., for the defendants.

The arguments were the same as in the court below.

BRAMWELL, L.J.: I think that this appeal must be allowed. The statute must be read as if s. 8 included s. 10, then it is clear that the consequences mentioned in s. 8 are the only consequences which would follow from the bill of sale not being attested by a solicitor. The provisions mentioned in s. 10 are not for the sole benefit of the grantor; they are inserted for the benefit of the general creditors, for no solicitor would attest a bill of sale unless the facts were true and the transaction was *bona fide*; and if he explained the deed to the debtor, he would know whether he was committing a wrong against the general body of the creditors. The solicitor also being known is a guarantee as to the genuineness of the transaction. If, however, s. 10 was intended for the benefit of the grantor, inasmuch as the Legislature have not attached a consequence to the non-fulfilment of its stipulations, the bill of sale is not void against the grantor.

\*BAGGALLAY, L.J., concurred.

[129]

THESIGER, L.J.: I am of the same opinion. The object of the new and the old act is the same. By s. 8 of the new act every bill of sale shall be attested; it shall be registered, and it shall set forth the consideration. Following upon these three directions certain results are to take effect. The words "otherwise such bill of sale as against all trustees or assignees of the estate of the person whose chattels are comprised in such bill of sale, or under any assignment for the benefit of the creditors of such person, and also as against

(') 5 C. Pl. Div., 20.

1879

Hayton v. Irwin.

all sheriff's officers, &c., shall be deemed fraudulent and void," govern all the three limbs of the previous part of the section. The word "shall" is repeated not only before "registered" but also before the words "set forth," so that upon the grammatical construction the clause expressly avoiding the bill if it does not apply to all the three limbs must apply to the last limb only, and would thus not apply to the enactment as to registration to which Lord Coleridge admits that it must apply. The sole result of not performing the directions contained in the first part of the section is to avoid the bill against certain specified persons, of whom the grantor is not one. Section 10 does not carry the matter further; it explains s. 8, and points out the mode in which the directions of that section are to be complied with. It must be read with s. 8. I cannot say that the creditors have no interest in having the bill of sale explained to the grantors.

*Judgment reversed.*

Solicitors for plaintiff: *Harper, Broad & Battcock.*

Solicitors for defendants: *Milne, Riddle & Mellor.*

---

[5 Common Pleas Division, 130.]

Dec. 3, 1879.

[IN THE COURT OF APPEAL.]

130]

\*HAYTON V. IRWIN.

*Ship—Charterparty—To deliver at a given Port, "or so near thereto as the Ship could safely get"—Custom inconsistent with the Contract.*

By a charterparty the vessel was to deliver at H., "or so near thereto as she could safely get;" to discharge as customary; the cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. and sent in them to H. Her owner having sued the charterer to recover the lighterage expenses:

*Held*, that a defence alleging that by the custom of the port of H. the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses.

**ACTION** for not taking delivery of goods pursuant to charterparty.

Claim. 1. The plaintiff is the managing owner of the *Elizabeth Ostle*, and is a partner in the firm of *Hayton & Simpson*, of *Liverpool*.

2. The defendant is a merchant carrying on business in London.

3. The plaintiff on the 10th of April, 1878, through the firm of Hayton & Simpson, chartered the Elizabeth Ostle to the defendant. The material parts of the charterparty were as follows:

It is this day mutually agreed between Messrs. Hayton & Simpson, owners, &c., now on passage to Hong Kong, on the one part, and R. W. Irwin, of London, merchant, on the other part:

1. That the said vessel, being tight, staunch, and strong, a first-class risk in the insurance offices in England, and in every way fitted for the intended voyage, after completion of present voyage and discharge of cargo, shall proceed with all possible dispatch to load at any one safe port in Japan as ordered at Hong Kong, or so near thereto as she may safely get and be always afloat, and there receive from the factors of the merchant a full and complete cargo of rice in bags, and [or] such other lawful merchandise, being measurement goods, as charterer's agents may wish, but not exceeding what she can reasonably stow and safely carry over and above her tackle, apparel, stores, cabin, and accommodation for crew as customary, and, being so loaded, shall therewith proceed to a safe port in the United Kingdom, or on the continent between Havre and Hamburg, both ports included, as ordered at Queenstown or Falmouth within forty-eight hours after receipt of telegrams or letters of advice of arrival, or so near thereto as she can safely get, and deliver same on being paid [131 freight at and after the rate of 52s. 6d. per ton of 20 cwt. net weight delivered of rice or other weight goods, or 50 cubic feet for measurement goods; 52s. 6d. to continent (the act of God, &c., excepted).

3. Twenty lay days (Sundays and holidays excepted) are to be allowed the merchant, if the ship is not sooner dispatched, for loading the ship, and to discharge as customary with all possible dispatch; the lay days to commence 24 hours after notice in writing of the vessel being ready to load has been given to charterer's agents.

4. Should the vessel be detained by charterer's agents over and above the said lay days, demurrage shall be paid to the master or his order day by day, at the rate of £16 per day during such detention.

5. The cargo to be brought to and taken from alongside the ship at merchant's risk and expense.

4. The Elizabeth Ostle was loaded by the defendant at Japan under the above charter, and was ordered to Hamburg.

5. She sailed for Hamburg; but her draught of water with the cargo on board was so great that she could not get up the river to Hamburg. Stade was as near thereto as she could safely get; and when at Stade the plaintiff, in accordance with the terms of the charter, was willing to deliver the cargo to the defendant there, or to deliver to him there so much of the cargo as would lighten the ship sufficiently to enable her to proceed up the river Elbe to Hamburg.

6. The defendant refused to take delivery of the cargo or of any part thereof at Stade, and refused to perform, and broke the charter.

7. The plaintiff, for the purpose of completing the voyage and earning freight, discharged part of the cargo into lighters at Stade, and the same was delivered from the light-

1879

Hayton v. Irwin.

ers to the defendant's agent at Hamburg. When lightened, the Elizabeth Ostle proceeded to Hamburg and there delivered the remainder of the cargo to the defendant's agent.

8. The lighterage expenses necessarily incurred by the plaintiff in consequence of the defendant's breach of the charterparty amounted to £38 13s. 5d. The plaintiff claimed that sum.

Defence. 5. By the custom of the port of Hamburg, the defendant was not bound to take delivery of the cargo or any part of it at Stade or elsewhere than at the port of Hamburg; nor were lighterage expenses incurred by the plaintiff for the purpose of lightening the vessel and enabling [32] her to proceed up the river to \*Hamburg and there complete the unloading of her cargo, in the absence of special agreement, recoverable from the defendant by the plaintiff.

Demurrer to the 5th paragraph of the statement of defence, on the ground that the plaintiff's rights under the charterparty sued upon to have delivery taken at Stade, are not affected by or subject to the custom of the port of Hamburg.

Nov. 8. *French*, for the plaintiff: The custom set up by the 5th paragraph of the statement of defence is inconsistent with the written contract, and therefore not binding on the plaintiff in the absence of evidence that he was not cognizant of it: in that case he might be assumed to have contracted with reference to it: *Kirchner v. Venus* (1); notes to *Wigglesworth v. Dallison* (2); 1 Smith's Leading Cases, 8th ed., 594, 602, citing the judgment of Parke, B., in *Hutton v. Warren* (3), which was adopted by Blackburn, J., in his judgment in *Myers v. Sarl* (4). And see *Norden Steam Co. v. Dempsey* (5) and *Robinson v. Mollett* (6).

*Wilberforce*, for the defendant: The custom relied upon by the defendant is not inconsistent with the contract. By the 1st paragraph of the charterparty the ship was to proceed to the port of delivery (Hamburg), "or so near thereto as she could safely get;" and by the 3d paragraph the cargo was to be discharged "as customary." The custom of the port of Hamburg is thus incorporated in the contract. The port of delivery means the actual port, or some place within the ambit of the port where ships are usually unladen: *Schilizzi v. Derry* (7); *Metcalf v. Britannia Ironworks*

(1) 12 Moo. P. C., 361.

(2) 1 Doug., 201.

(3) 1 M. & W., 474.

(4) 3 E. & E., 306.

(5) 1 C. P. D., 654; 18 Eng. R., 252.

(6) Law Rep., 7 H. L. C., 802; 14 Eng. R., 177.

(7) 4 E. & B., 873.



Co. (¹), affirmed on appeal (²). Whether or not the place where delivery is offered is within the port or not, must necessarily depend upon the custom of the particular port: *Hillstrom v. Gibson* (³); *Parker v. Winlow* (⁴); *Bastifell v. Lloyd* (⁵); 1 Parsons on Shipping, p. 237.

*French*, was heard in reply.

\*GROVE, J.: I am of opinion that this demurrer [133 must be allowed. Upon the face of the pleadings the charterparty is thus stated: The vessel, being loaded in Japan, is to proceed to a safe port, as ordered on arrival at Queens-town or Falmouth,—say, to Hamburg,—“or so near thereto as she can safely get,” and deliver her cargo on being paid freight. It is further provided that she is “to discharge as customary, with all possible dispatch,” and that the cargo is to be “brought to and taken from alongside the ship at merchant’s risk and expense.” The statement of claim alleges that the ship, being ordered to Hamburg, sailed for that place, but her draught of water with the cargo on board was so great that she could not get up the river to Hamburg; that Stade was as near thereto as she could safely get; that, when at Stade, the plaintiff, in accordance with the terms of the charter, was willing to deliver the cargo there, or so much of it as would lighten the ship sufficiently to enable her to proceed up the river to Hamburg, that the defendant refused to take delivery of the cargo or of any part thereof at Stade; that the plaintiff, for the purpose of completing the voyage and earning freight, discharged part of the cargo into lighters at Stade, and the same was delivered from the lighters to the defendant’s agent at Hamburg; and that the ship when lightened proceeded to Hamburg and there delivered the remainder of the cargo, and so certain expenses were incurred. The substance of that is, that the vessel got as near to the port of delivery as she could safely get, and the plaintiff then offered to perform the contract in the only way in which he could perform it, but the defendant refused to accept delivery there. The answer set up by the defendant is, that, by the custom of the port of Hamburg, he was not bound to take delivery of the cargo or any part of it at Stade or elsewhere than at the port of Hamburg. To this there is a demurrer on the ground that the plaintiff’s rights under the charterparty are not affected by the alleged custom; in other words, that the custom set up by the statement of defence is inconsistent with the terms of the

(¹) 1 Q. B. D., 613; 18 Eng. R., 83.

(²) 22 L. T. (N.S.), 248.

(³) 2 Q. B. D., 423; 21 Eng. R., 198.

(⁴) 7 E. & B., 942.

(⁵) 1 H. & C., 388; 31 L. J. (Ex.), 413.

1879

Hayton v. Irwin.

charterparty. The contract is, to deliver at Hamburg or so near thereto as the ship can safely get; the custom set up is, to deliver at Hamburg, whether the ship could get there or not. I think the custom is clearly inconsistent with the contract, and cannot be allowed to control it. The [34] \*Scotch case, *Hillstrom v. Gibson* (<sup>1</sup>), seemed to me at first sight to present considerable difficulty as to the *ratio decidendi*: but, when carefully looked at, it will be found to be by no means opposed to the view which I take: the custom there relied on was reasonably consistent with the contract. I think the demurrer must be allowed.

*Judgment for the plaintiff.*

The defendant appealed.

Dec. 3. *Wilberforce*, for the defendant: The custom alleged in the defence is consistent with the contract contained in the charterparty; the ship may be unloaded, either wholly or in part, at Stade, but in that case the owner must bear the expense of sending the goods up the river to Hamburg. The charterer is not bound to repay him the lighterage expenses. The freight would not have been earned if the cargo had been landed at Stade, *Metcalf v. Britannia Ironworks Co.* (<sup>2</sup>); for a vessel must be unloaded according to the custom of the port of discharge, *Norden Steam Co. v. Dempsey* (<sup>3</sup>); the plaintiff was bound to lighten the vessel in order to bring her and her cargo to Hamburg: *Hillstrom v. Gibson* (<sup>1</sup>).

*French*, for the plaintiff, was not called upon to argue.

PER CURIAM (Bramwell, Brett, and Cotton, L.JJ.): It is very clear that the decision of Grove, J., was right. The words of the charterparty provide that the vessel was not to go at all hazards into the port itself, and the express contract of the parties cannot be controlled by the custom. The terms of the contract exclude the custom. When the vessel reached Stade she was as near to Hamburg as she could safely get, and the defendant was bound to take at Stade delivery of her cargo until she was sufficiently lightened to enable her to proceed up the river to Hamburg; as he failed to do this, he must pay the lighterage expenses incurred by the plaintiff.

*Appeal dismissed.*

Solicitors for plaintiff: *Prior, Bigg, Church & Adams*, for J. B. Wilson, Liverpool.

Solicitor for defendant: *J. McDiarmid*.

(<sup>1</sup>) 22 L. T. (N.S.), 248.

(<sup>2</sup>) 2 Q. B. D., 423; 21 Eng. R., 198

(<sup>3</sup>) 1 C. P. D., 654; 18 Eng. R., 252.

[5 Common Pleas Division, 143.]

Feb. 26, 1880.

**\*PORTER V. DREW and Another.** [143]*Landlord and Tenant—Lease—Covenants—Express—Implied—Underlease—Fixtures.*

An underlease of a nursery ground contained an express covenant by the underlessee to deliver up all landlord's fixtures thereon at the end of the term :

*Held*, that a representation and covenant by the grantors of the underlease that the underlessee should be at liberty, without hindrance from any one, to remove trade fixtures during the term, and that the grantors had not entered into covenants inconsistent with such right, could not be implied.

**CLAIM:** On the 11th of November, 1871, the defendants by an indenture of lease under seal leased to the plaintiff, who is and was by trade a nurseryman, a messuage and nursery ground, known as the Paragon Nursery, for the term of six and a quarter years less the last three days thereof, from the 24th of June, 1872, at a rental of £60 per annum, and the indenture contained, amongst other covenants, on the part of the plaintiff, the lessee, the following: "and that the lessee, his executors, administrators, or assigns, will at the expiration or sooner determination of the said term, deliver up to the lessors, their heirs or assigns, the said premises and all landlord's fixtures which may at any time during the said term be in or about the same." The indenture did not contain the usual limited covenant by the lessors, for quiet enjoyment of the premises by the lessee, nor any express covenant for quiet enjoyment.

2. The plaintiff remained in possession of the premises until the lease expired by effluxion of time on the 26th of September, 1878, and during the time of his possession, with the knowledge and acquiescence of the defendants, placed certain greenhouses and other trade fixtures upon the nursery ground, and annexed the same to the freehold. The plaintiff, in so placing and annexing \*the trade fix- [144  
tures, relied upon the said express provision in the covenant whereby the tenant at the expiration of the term covenants to deliver up to the lessors all landlord's fixtures, to the exclusion of trade fixtures, and upon the implied representation and covenant of the lessors that the plaintiff should be at liberty, without hindrance from any one, to remove during the continuance of the term the said fixtures, and that they, the defendants, had not at the time of the execution by them of the lease entered into covenants or engagements or done anything inconsistent with the right of the

defendant as lessee to carry on the trade of a nurseryman, and remove before the end of the term trade fixtures annexed by him to the nursery ground during the term.

The defendants at the time when they executed the lease to the plaintiff as such nursery gardener as aforesaid, were themselves tenants of the nursery garden and premises under a superior lease expiring at Michaelmas, 1878, containing a covenant by the lessees to deliver up at the expiration of the term not only all landlord's fixtures, but also all trade fixtures annexed during the last seven years of the term under the superior lease.

The plaintiff was not aware until the granting of the injunction hereinafter mentioned that the defendants held under the superior lease, or any lease containing any covenant for the delivery up of trade fixtures, or any covenants in restraint of trade, or other unusual covenants.

Shortly before the determination of the term under the lease by the defendants to the plaintiff, the plaintiff sold the greenhouses and other trade fixtures to one Hall for £120, but afterwards the reversioners under the superior lease obtained, ex parte, an interim injunction, and commenced an action in the Chancery Division to restrain the plaintiff from removing the trade fixtures. The plaintiff acting reasonably defended the action, but judgment was given therein for the reversioners with costs, and a perpetual injunction granted, restraining the now plaintiff from removing the trade fixtures, whereby he was prevented from performing the contract of sale to Hall, and lost the price of the fixtures, and became liable to costs. The plaintiff claimed the value of the fixtures and the costs of defending the action brought by the reversioners.

[145] \*Defence. Denial, *inter alia*, of the allegation that the plaintiff placed the greenhouses and other trade fixtures upon the nursery ground with the knowledge or acquiescence of the defendants, and demurrer to the rest of paragraph 2, on the ground that the tenant's express covenant to deliver up all landlord's fixtures, and the facts, as in the statement of claim alleged, did not in law create an implied covenant on the part of the lessors either that the tenant should be at liberty to remove the trade fixtures during the continuance of the term, or that the lessors had not at the time of the execution by them of the lease entered into any covenant or engagement or done anything inconsistent with the right of the tenant to remove trade fixtures annexed by him during the term.

A. Wills, Q.C. (*Kingsford* with him), for the defendants:

No such representation or covenant as that alleged in paragraph 2 of the defence can be implied from the express covenant in the lease. The plaintiff had constructive notice of the provisions of the original lease, as he had a fair opportunity of ascertaining what they were: *Hyde v. War-den* (\*). Unless, indeed, it appears that he made careful inquiries at the time of taking his lease and learnt nothing which should have set him on further investigation: *Parker v. Whyte* (\*). But there is nothing to show that he made any inquiry, and if he takes his lease without inquiry he has constructive notice of at least all usual covenants in the original lease: *Flight v. Barton* (\*). The fact of the lease to the plaintiff being for six and a quarter years, less the last three days thereof, would inform him that it was only an underlease.

[*R. V. Williams*, for the plaintiff, admitted that he knew there was a superior lease, but did not know the terms of it.]

Then he should have inspected it. It is impossible to imply a representation to him by the defendants that if they chose to put up trade fixtures there was no covenant in the superior lease preventing the removal of them. Even if there were such a representation an action could only be maintained on the ground of fraud.

\**R. V. Williams*, for the plaintiff: The case depends [146 on two questions: first, whether, from the grant of a lease in the terms and under the circumstances stated, a representation by the defendants that the plaintiff would be allowed to remove trade fixtures will be implied. Secondly, if so, and such representation were untrue, is that a cause of action?

The lease was of a nursery ground. The parties evidently contemplated that valuable greenhouses would be placed on it by the plaintiff. Those are trade fixtures. An express covenant was entered into that the landlord's fixtures should be given up, and consequently there was an implied representation or covenant that the other fixtures might be removed. From an express stipulation in an agreement by a lessee to grant an underlease, a representation will be implied that there is nothing in the superior lease inconsistent with such stipulation: *Van v. Corpe* (\*). Surely a leaseholder who requires from a sub-lessee a covenant not to carry on a particular trade, as of a baker, impliedly represents that any other trade may be carried on. If an agree-

(\*) 3 Ex. D., 72.

(\*) 1 H. & M., 167.

(\*) 3 My. & K., 282.

(\*) 3 My. & K., 269.

1880

Porter v. Drew.

ment for a lease contains no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants, *Propert v. Parker* <sup>(1)</sup>, and the constructive notice on which the defendants rely is only of usual covenants: *Flight v. Barton* <sup>(2)</sup>. There the lessee failed to inform a person agreeing for a sub-lease that there was a covenant in the superior lease prohibiting the trade which he proposed to carry on, and Sir John Leach, M.R., held that the silence of the lessee was equivalent to a representation that there was no such prohibitory covenant. Here there was an unusual covenant, and more than mere silence, for the defendants were aware that the plaintiff was about to carry on a trade involving the erection of trade fixtures, and led him to believe he could remove them. *Cosser v. Collinge* <sup>(3)</sup> is somewhat adverse to the plaintiff, but it may be considered as settled that the principle of that case can only be applied where the sub-lessee has a fair opportunity of ascertaining for himself the provisions of the original lease: see per Brett, L.J., *Hyde v. Warden* <sup>(4)</sup>.

[147] \**Wills*, Q.C., replied: The cases cited of suits for specific performance are inapplicable. The Court of Chancery merely refused to force a man to take one thing when he had agreed for another. The construction of a lease is quite a different question. In *Dennett v. Atherton* <sup>(5)</sup>, the defendant being under a covenant not to permit the trade of a beerseller on the premises, made a lease whereby the lessee covenanted not to carry on certain other trades (that of beerseller not being one), and the defendant covenanted for quiet enjoyment. The Court of Exchequer Chamber held that the express covenant for quiet enjoyment excluded any implied covenant and did not amount to a warranty to the lessee that he might use the premises for any purpose not mentioned in the restrictive covenant he had entered into.

If the contention for the plaintiff were to prevail, the doctrine of implied covenants would be dangerously extended.

GROVE, J.: I am of opinion that the demurrer must be allowed. In the second paragraph of the claim the plaintiff, putting his own construction on the covenant, alleges that he relied upon the express provision in the covenant whereby the tenant at the expiration of the term covenants to deliver up to the lessors "all landlord's fixtures to the exclusion of trade fixtures." Such exclusion was, however,

<sup>(1)</sup> 3 My. & K., 280.

<sup>(2)</sup> 3 My. & K., 282.

<sup>(3)</sup> 3 My. & K., 283.

<sup>(4)</sup> 3 Ex. D., 72.

<sup>(5)</sup> Law Rep., 7 Q. B., 316; 2 Eng. Rep., 77.

not express but, if anything, implied. The express covenant was only to deliver up all landlord's fixtures. This might not unreasonably be said to imply that the tenant was not bound to deliver up some other fixtures, and that his landlord would not claim other than landlord's fixtures. But the plaintiff seeks to extend the implied covenant much further. On his construction it would be not only a covenant by the landlord not to himself interfere with other than landlord's fixtures, but that he will prevent anybody else interfering, and will guarantee the tenant against the head landlord taking these fixtures as being immovable, and will either prevent the head landlord seizing them or will pay damages for breach of covenant; and indeed I do not see why such guarantee should not apply to anybody else connected with the landlord and having a legal claim to the fixtures. Moreover the alleged implied covenant is not restricted \*to things on the premises at the date of the lease to [148 the plaintiff. These indeed are not claimed at all. The claim is for fixtures placed on the premises subsequently to the execution of the underlease.

It seems to me that if such an implied covenant as the one alleged were to be implied from an express covenant to deliver up all landlord's fixtures, it would be difficult to fix the limit of implied covenants. It would come to this: that in, perhaps, a short lease containing one or two covenants only, we must imply that the landlord covenants against everything else relating to the subject-matter, because he makes one or two stipulations with respect to himself. The argument cannot stop short of this—that the defendants not only disclaimed all except landlord's fixtures, but guaranteed against interference by the head landlord. It would be a strong implication indeed. Nothing in the cases cited goes nearly so far. Moreover it is admitted that, the three last days of the six-and-a-quarter years being excepted from the term, the lease on the face of it obviously refers to some other lease, and shows there is some other lease. Mr. Williams, indeed, admitted that the tenant knew of a head lease.

Under these circumstances am I to imply a covenant by way of warranty that the head landlord shall not interfere with the tenant, who has had an opportunity of looking into the head lease and knows of its existence, merely because the defendants have put into the sub-lease some fixture covenants for their own benefit? It would be unreasonable, and involve every one drawing leases in great difficulty, if he would have to anticipate that other things might be in-

1880

Porter v. Drew.

ferred from the insertion of a covenant as to one particular matter. I can imply no such covenant as that on which the claim is founded. I will now examine some of the authorities cited, to see if they bear out the plaintiff's case:

First, as to the distinction between an action for specific performance and an action for breach of covenant which Mr. Wills pointed out. Suppose that, instead of this being an action for damages, an agreement only had been signed in the terms of this lease and the lessee had sought to enforce specific performance—not of what was in the agreement but—of a stipulation that neither the lessor, nor the head [149] landlord should interfere to prevent \*the lessee taking away the fixtures. I do not think any court would order specific performance of anything but that which is fairly involved in the words.

The cases are a little conflicting. *Cosser v. Collinge* (\*) goes farthest of them all. There an unusual covenant, or a covenant held to be unusual, was contained in a head lease, and the court decided that there being merely notice of the head lease, but ample opportunity of seeing it at the solicitor's office, the defendant was liable to the covenants of the head lease, although they were unusual. The Master of the Rolls in the first part of his judgment decides the case quite irrespective of the fact that the head lease was at the solicitor's office, and might have been inspected, and then goes through the evidence and comes to the same conclusion. The other cases do not go quite so far, for in *Flight v. Barton* (\*) it was held that where a lessee knows of the existence of a head lease, he has constructive notice of all usual covenants in it. But the question is whether he has notice of unusual covenants. Then, in *Van v. Corpe* (\*), there was an express provision, which it was said amounted to a representation that there was nothing in the superior lease but the usual covenants. The agreement was that there should be all usual covenants, and that the house should not be turned into a school; and it was held, in an action for specific performance of an agreement for a lease with all usual covenants, that the party was bound to grant a lease with all usual covenants in it. That does not touch this case, and I am rather surprised the point should have been disputed there. In *Probert v. Parker* (\*) the lessee did not know of the head lease, so that case does not properly apply to the present one. On the other hand, *Dennett v. Atherton* (\*) appears in favor of this demurrer.

(\*) 3 My. &amp; K., 283.

(\*) 3 My. &amp; K., 269.

(\*) 3 My. &amp; K., 282.

(\*) 3 My. &amp; K., 280.

(\*) Law Rep., 7 Q. B., 316; 2 Eng. Rep., 77.



None of the cases support this statement of claim, or decide that because a person covenants for his own benefit that certain things shall be done, he is therefore to be taken to imply not only that certain other things shall be done, but that he will guarantee that the landlord, or even others, shall not interfere. On that \*distinction, which is a [150 broad one, my judgment is mainly based. But there is another point. Supposing a person having a covenant on a particular subject might be held to imply the converse of it: for example, suppose the covenant here should imply that no other than landlord's fixtures should be given up, ought not the covenant only to be implied when the matter must be, I will not say reasonably but, necessarily in the contemplation of the parties, for otherwise it would fix them with a covenant not in their thoughts at all? Here, for instance, was a nursery ground: could it be said that, because the subject-matter of the demise happened to be a nursery ground, the landlord is to be supposed to be bound as to fresh buildings of a character not called landlord's fixtures, and to be guaranteeing the tenant against removal. A very strong construction that would be. It would, in fact, be making the landlord covenant for a matter which he never might have thought of at all. If it were an old nursery ground, nobody would suppose any more erections were going to be placed on it. Yet it is said that the landlord is making himself liable to protect the tenant against the head landlord claiming anything other than landlord's fixtures placed on the premises during the term.

*Judgment for the defendants, with costs; leave to the plaintiff to amend.*

Solicitors for plaintiff: *Harper, Broad & Battcock.*

Solicitors for defendants: *Wilkinson & Drew.*

[5 Common Pleas Division, 157.]

March 9, 1880.

[IN THE COURT OF APPEAL.]

**157] \*FOULKES V. THE METROPOLITAN DISTRICT RAILWAY COMPANY (¹).***Railway—Passenger—Ticket issued by One Company—Injury whilst travelling by Train of Another—Negligence—Liability of Carriers.*

The defendants, a railway company, had running powers between H., a station upon their own line, and R., a station of the S. company, over the line of that company. The defendants and the S. company divided the profits of the traffic between H. and R. The plaintiff took a return ticket from R. to H., which was issued to him by a clerk of the S. company. Upon the return journey from H. to R. he travelled in a train belonging to the defendants, and driven by their servants. Owing to the carriage being unsuited to the platform at R., which belonged to the S. company, the plaintiff sustained bodily injury. At the trial the jury found that the defendants had been guilty of negligence:

*Held*, that an action lay against the defendants, for they, having permitted the plaintiff to travel by their train, were bound to make provision for his safety.

APPEAL by the defendants from a decision of Grove and Lopes, JJ., discharging a rule to set aside a verdict for the plaintiff.

The facts, as they appeared during the argument in the Common Pleas Division, are fully stated in the report of the proceedings before that court (¹); and, as they appeared during the argument in the Court of Appeal, they are stated in the judgment of Baggallay, L.J., *post*, p. 160.

Feb. 26, 27. *A. L. Smith* (*Macrae*, with him), for the plaintiff.

*Sir H. Giffard*, S.G. (*Waddy*, Q.C., and *E. Clarke*, with him), for the defendants.

The arguments in this court are sufficiently noticed in the judgments. The following authorities were cited in addition [58] to \*the cases mentioned: *Bristol and Exeter Ry. Co. v. Collins* (²); *Martin v. Great Indian Peninsular Ry. Co.* (³); *Hayn v. Culliford* (⁴).

*Cur. adv. vult.*

March 9. The following judgments were delivered:

BRAMWELL, L.J.: In this case the first question is, with whom did the plaintiff contract? The contract was a contract for carriage, the carriage of himself. Who were the carriers? The defendants. The carriages are theirs, the motive power and the servants driving and conducting, they

(¹) Affirming, *ante*, p. 533.

(²) 7 H. L. C., 194.

(³) 4 C. P. D., 267, *ante*, p. 536.

(⁴) Law Rep., 3 Ex., 9.

(⁵) 4 C. P. D., 182; 30 Eng. R., 482.

have a right to carry over the whole length the plaintiff is to be carried, and they get and keep at least part of the reward of these things. What ground or reason is there for saying they are not the contractors to carry? The journey is, indeed, part over the road of the South Western Company, and the servants of the South Western Company in the first instance receive the fare. But how does that affect the case? If the defendants' servants had in the first instance received the fare, it is clear the contract would have been with the defendants, and it is therefore clear that the ownership of the road does not affect the question. Nor can it matter whether defendants receive the fare by the hands of their own servants or those of others: nor in truth that, by arrangement with the South Western Company the South Western Company should receive it mainly for themselves, and only in part for the defendants. The defendants, I repeat, are the carriers, and the contract of carriage is with them. If the interest of the South Western in the matter affects this reasoning, it would at the outside go to show that the two companies are partners, and the contract was with them jointly. That would not disentitle the plaintiff to recover against these defendants alone. It is impossible to say that the fare was received for the South Western only. Suppose a receiver were appointed of the South Western's tolls and takings; could it be contended that this money could be taken by him without the defendants being entitled to a share of it?

But, further, though the contract were with the South Western, \*the plaintiff is entitled to recover against [159 these defendants. In that case there would be no duty of contract, and consequently no cause of action for a nonfeasance. But there would be that duty which the law imposes on all, namely, to do no act to injure another. It is clear that if a porter of the defendants had run a truck against the plaintiff at Broadway station, and hurt him, he could maintain his action against the defendants. So if he had left the carriage there, and while getting in, the train improperly started, and he was hurt, or if his hand was wrongfully pinched. These are clear cases, but the law is the same in cases not so clear; for example, if the carriage he was put in was dangerous, if the step he had to tread on was rotten. Apply that to the present case. The difficulty is with the question and finding: the jury have found there was negligence. Now, there was no negligence. What was done or omitted was wilful. But the substance of the finding of the jury is that the carriage was dangerous with refer-

ence to the platform, or the platform with reference to the carriage, and that the plaintiff might and did reasonably act in the belief that they were not in that state, but safe for him to use; that in truth the combined arrangements were a trap or snare: so that if he had been carried gratuitously as by a friend, he would have had a right of action against him. With the propriety of so finding we have nothing to do. There was according to that finding a tort, whether in the defendants alone or in conjunction with the South Western does not matter, and the plaintiff is entitled to recover. I say nothing about the authorities. But if the contract had not been a contract with the defendants, and all that could have been complained of was a nonfeasance, I should hold they were not liable.

BAGGALLAY, L.J.: This is an appeal from an order of a Divisional Court of the Common Pleas Division, discharging a rule, which had been granted on the motion of the defendants after verdict and judgment for the plaintiff, and which was treated by the Divisional Court as being in effect, though expressed in somewhat doubtful terms, a rule to enter the verdict for the defendants, on the ground that, upon the facts proved at the trial, there was no evidence to go to the [160] jury of any liability on the \*part of the defendants in respect of the alleged negligence, or, in the alternative, for a new trial. I agree with the Divisional Court in the conclusions at which it has arrived as to both of these alternatives. The mistakes which have been made in the course of the proceedings in this action as to material facts and circumstances, and the corrections from time to time made or purported to be made of such mistakes, appear to me to have so important a bearing upon the question whether a new trial should be directed that I propose to allude to them somewhat in detail.

At the very outset of the proceedings, the pleadings on both sides were framed on the erroneous assumption that, on the occasion of the accident which gave rise to the litigation, the plaintiff was travelling from Hammersmith to Richmond with a ticket taken by him at the Hammersmith station of the District Company, whereas he had, in fact, travelled with a return ticket which he had previously taken at the Richmond station of the London and South Western Company; and this erroneous view was apparently acted upon by both parties, at any rate by the defendants, until after verdict and judgment; for it appears from the notes of the Lord Chief Justice, taken at the trial, that the statement then made by the plaintiff that he had taken a return

ticket to New Richmond station (a statement in one sense true, but nevertheless calculated to mislead) was in no respect contradicted by evidence on the part of the defendants, nor was he cross-examined upon it. Indeed, so far as I can form an opinion from the notes of the judge and from the allusions to the trial in the printed report of the proceedings before the Divisional Court, it would appear to have been assumed that if negligence was proved against the carrying company, and the contributory negligence which had been suggested was negatived, the verdict must be against the defendants. That this general impression prevailed, is, I think, further shown by the circumstance that in the printed report<sup>(1)</sup> it is stated that the paragraph of the statement of claim in which the plaintiff alleged that he had been received by the defendants as a passenger, to be carried by them from Hammersmith to Richmond for reward to the defendants, was \*admitted by the defendants, where- [161 as in fact it was not admitted, and it would consequently have been open to the defendants to negative it at the trial, had they been in a position to do so. The mistake in the report could hardly have occurred, had it not been that the allegation was not in fact disputed, though technically speaking it was not admitted. It was also stated by the counsel for the plaintiff in the proceedings before the Divisional Court, and, apparently without contradiction, that it had been admitted by the pleadings and proved at the trial, that the contract of carriage was made with the defendants. I am aware that, in the course of the proceedings, allusion was made to certain answers to interrogatories which it was alleged had been the subject of comment at the trial, but those answers amounted to no more than a general statement that the tickets issued at the Richmond station were issued by the South Western Company, and not by the defendants, and it was in no way stated in the answers or suggested by them, that the ticket with which the plaintiff had travelled had been issued by the South Western Company. So far then as the facts proved at the trial are concerned, I entirely agree with the views expressed by Grove, J., to the effect that there was ample evidence for the plaintiff and none for the defendants. But I have to refer to another mistake of a very singular character; upon the application to the Common Pleas Division affidavits were read on behalf of the defendants, drawing attention to the mistake under which the pleadings had been framed, and to the fact that the ticket by which the plaintiff travelled had been issued

(1) 4 C. P. D., 268; 30 Eng. R., 536.

1880

Foulkes v. Metropolitan District Railway Co.

to him by the South Western Company, and upon this fact was based the argument which has been repeated before us, that the contract of carriage was with the South Western Company, and that no liability upon it attached to the defendants. The earlier mistake apparently originated in a statement made by the plaintiff in one of the many conversations held by him with officials of the defendants, when he was referred from one to another upon the subject of his complaint. Among the affidavits so read on behalf of the defendants, was one by Mr. Forbes, the chairman of the District Company, in which he purported to explain the nature of the arrangements between the South Western and [162] District Companies for the working of the \*traffic between Richmond and the district station at Hammersmith, and, in so doing, he stated as the effect of such arrangement, that the plaintiff, whilst returning from Hammersmith to Richmond by the return ticket which he had previously taken at the South Western Company's station at Richmond, was a local passenger of the South Western Company, and that the District Company would not receive any part of the toll paid by him. That this was the true nature and effect of the arrangements between the two companies, was assumed and acted upon in the proceedings before the Divisional Court, and the arguments before us were commenced, and were for some time continued, upon the same footing. But in the course of the arguments before us, more accurate and certain information as to the nature and effect of those working arrangements was asked for, and it was then ascertained, and it is now admitted, that, according to the actual arrangements between the two companies, the plaintiff, on the occasion in question, was not, as erroneously stated by Mr. Forbes, a local passenger of the South Western Company, but a through passenger, and in that sense a passenger of both companies, and further that the District Company was entitled to a proportionate part of the price which had been paid by him on his taking his return ticket at the office of the South Western Company. It is difficult to understand how such a mistake could have been made by Mr. Forbes, in respect of a matter so completely within his own cognizance; it is, however, only fair to that gentleman to point out, that the other paragraphs of the same affidavit contain information quite sufficient to show that the statements to which I have referred could not be accurate; for he had not only explained the distinction, as recognized by the Railway Clearing House, between through and local traffic; but had so far indicated the nature and extent of the

interests of the two companies, in the line between Richmond and the District Company's station at Hammersmith, as to lead to the conclusion that the traffic over such lines must, according to the definitions given, be through and not local. But, however this may be, we have now before us for our consideration a very different state of circumstances from that which was placed before the jury at the trial, or was in evidence before the Divisional Court from whose order the appeal is \*brought, though Grove, J., ap- [163 pears to have expressed an opinion to the effect that it was not probable that a railway company would run their trains and carriages for several miles as a mere gratuity to the public: this, however, was only an inference drawn by him from surrounding circumstances. Now, having regard to this succession of mistakes and misapprehensions, and bearing in mind that the actual state of circumstances upon which a decision ought eventually to be pronounced had not been submitted to the consideration of a jury, and that this was in part at least, if not entirely, owing to a misrepresentation originating with the plaintiff, I, for some time during the earlier arguments, inclined, and somewhat strongly inclined, to the opinion that a new trial should be directed, and that in such case it might be desirable to abstain from expressing any opinion upon the questions which might eventually arise for decision, and I was the more inclined to this view from the consideration, that I was by no means satisfied that we were even then fully informed as to the actual working arrangements which were in force between the two companies at the time when the accident occurred. But, upon a further consideration of the matter, I have come to the conclusion that we are apparently in possession of all the material facts essential to a final decision; that, if there are any such material facts, they are within the cognizance of the defendants, who have not thought it necessary to direct our attention to them; and that, under these circumstances, a jury could not with propriety come to any other conclusion than one in favor of the plaintiff, provided they were, as we must presume they would be, properly directed as to the law bearing upon the facts detailed to them. To send the matter to a new trial under such circumstances, would, I think, be to entail additional and useless expense upon all parties concerned.

My reasons for coming to the conclusion, that a new trial must of necessity have such a result, are as follows: as I have already stated, it has been urged on behalf of the defendants, the District Company, that the contract of car-

1880

Foulkes v. Metropolitan District Railway Co.

riage, having been created by the issuing and taking of a return ticket at the South Western Company's station at Richmond, must be regarded as a contract between the last named company and the plaintiff, and not as a contract 164] \*for a breach of which the District Company could be held liable.

I by no means intend to express any dissent from the suggestion so made of a liability on the part of the South Western Company in respect of the breach of the contract of carriage; it may well be that such a liability may coexist with a liability on the part of the District Company in respect of the negligence alleged against them; we know not, and have no private means of ascertaining, what the South Western Company might urge by way of answer to any such suggested liability on their part; nor again do I deem it necessary to the decision of this case to express any decided opinion as to whether, under all the circumstances of this case, a contract of carriage, in the ordinary acceptation of the term, was created between the District Company and the plaintiff, though the strong inclination of my opinion is in favor of the view that such a contract was created; it appears to me sufficient to say that, apart from and irrespective of any such questions as those to which I have just referred, a duty or obligation was imposed upon the District Company, when they accepted the plaintiff as a passenger by their train, not only to carry him safely to the station where he was to alight, but to provide safe means for his alighting when he arrived at that station. The train by which the plaintiff travelled was in every sense their own; the locomotive and carriages belonged to them, the drivers, guards, and other servants in charge of it, were in their employment and in their pay; the line over which it ran was in part their own, and over the other part they had running powers, and in respect of that portion of the line, over which they had and were exercising running powers, they had the same duties and were under the same obligations relatively to their passengers and to the public generally, as they had and were under in respect of the portion of the line which was their own. The plaintiff was admittedly properly travelling by their line; he had, in the sense in which the word is ordinarily used, been invited to travel by it. The ticket, purporting to give him the right to travel by it, and by virtue of which he did in fact travel by it, had been issued to and paid for by him, with their full consent and concurrence, whether such issue created a contract of carriage binding on 165] and \*to be performed by them or not; and, on arriv-



ing at Richmond, the plaintiff was invited by the defendants ("required" would perhaps be the more correct expression) to alight.

Now whether the defendants were or were not entitled to any share or interest in the price paid by the plaintiff for his ticket, appears to me to be a matter of no importance, as regards the obligation which they took upon themselves when they invited and received him as a passenger by their train, to carry him safely to his journey's end, and to cause him no injury by the way by wilful or careless acts or omission; but even if the element of pecuniary interest were necessary to impose the obligation I have referred to, such element existed, inasmuch as the District Company had a direct pecuniary interest, small perhaps, but nevertheless substantial, in the price paid by the plaintiff for his ticket, as well as in the price paid for every other ticket issued by the South Western Company under similar circumstances.

Such, then, being the duty or obligation imposed upon the defendants, there cannot, I think, be any question or doubt as to their having failed to discharge it. That the arrangements for the alighting of the plaintiff at the Richmond station were of an insufficient and improper character cannot now be questioned, and it is, in my opinion, immaterial whether the platform was improperly constructed relatively to the carriage, or the carriage improperly constructed relatively to the platform; the latter is perhaps the more correct view, for though a footboard of only an inch and a half in width may occasion no danger or inconvenience, but, on the contrary, may be both safe and convenient, when the carriage is stopping at a platform differing but little in level from that of the floor of the carriage, and when the footboard serves only to stop a gap between the carriage and the platform, as is the case at the stations on the District Company's own lines, it manifestly must become a source not only of inconvenience, but of possible if not probable danger, when the level of the platform is upwards of two feet below that of the carriage, as was the case at the Richmond station on the occasion of the accident to the plaintiff. I should not have adverted to this subject had it not been suggested in argument that the accident was occasioned to the plaintiff, not by reason of any improper construction of the \*carriage in which the plaintiff [166 travelled, but by reason of the improper construction of the platform, and that the construction and maintenance of the platform was under the sole control of the South Western Company; but admitting the fact to be so, as it possibly is,

it was the duty of the defendants either to adapt the foot-board or step of their carriage to the platform it would have to approach, or to arrange for an alteration being made in the platform itself. To carry their passengers in carriages which were in any respect or for any purpose dangerous was, in my opinion, a misfeasance rather than a nonfeasance.

I regret to have to add that in my opinion negligence is too mild a term to apply to the carelessness of which the defendants have been guilty, for it appears from the correspondence that has been put in evidence, that they were warned, I believe before they commenced to run trains to the platform in question, but at any rate before the accident occurred, that their carriages were not adapted for the safe descent of passengers at the Richmond station, and that, should they persist in running carriages so constructed, an accident would almost inevitably occur; the last of these warnings was apparently given two days only before the accident occurred.

For the reasons which I have assigned, I am of opinion that the defendants have entirely failed to make out a case for having judgment entered for them in the action; and that, having regard to all the circumstances of the case, a new trial ought not to be directed.

THESIGER, L.J.: I agree that this appeal should be dismissed. If the right of the plaintiff to maintain his judgment depended solely on his establishing a contractual relation between him and the defendants, I should not dissent from the view that such relation has been proved. The affidavit of Mr. Forbes is not in itself inconsistent with the notion that the London and South Western Railway Company, in issuing tickets at their Richmond station for stations on the defendants' line, so issue them as agents for or as partners with the defendants. The notion, too, receives sanction from the decision in *Gill v. Manchester, &c., Ry.* 167] Co. (1). \*There the contract of carriage purported to be made with the Great Northern Railway Company, but the animal which was the subject of the contract was to be conveyed upon the defendants' line, and there were traffic arrangements between the two companies under which their rolling stock was treated as one stock, their traffic was interchanged, and the receipts from through traffic were divided by mileage. It was held, that by virtue of those arrangements the Great Northern Railway Company, whether as partners with the defendants or otherwise, became the agents

(1) Law Rep., 8 Q. B., 186; 5 Eng. R., 187.

of the latter to make the contract of carriage with the plaintiff. In the present case, under the traffic arrangements between the two railway companies, the defendants supply the rolling stock and carry in the exercise of their running powers the whole of the through traffic, taking a mileage proportion of the receipts from such traffic, with an allowance for working expenses. It is admitted that traffic between Richmond and the defendants' station at Hammersmith constitutes through traffic, and it may therefore be urged with force that in booking such through traffic at Richmond the London and South Western Railway contract, either as agents for the defendants, or for the defendants jointly with themselves. This view is further strengthened by the form of the ticket issued at Richmond to passengers travelling from Richmond on to the Metropolitan District line, when contrasted with that issued to passengers travelling elsewhere, and by what is written over the booking office; and although I am by no means prepared to hold that under traffic arrangements similar to those which exist between the two companies, it is not open to a company in the position of the London and South Western Railway Company to make the contracts of carriage in such a way as to make itself exclusively liable upon them, or to deny that in most cases it must be a question for the jury whose the particular contract may be, I think that, under the peculiar circumstances of the present case and upon the materials before us, the court would not be justified in disturbing the judgment for the plaintiff and sending that question down for trial.

But it is not necessary for us to rest our judgment upon any contractual relation between the plaintiff and the defendants, for I am of opinion that it has been rightly contended for him that \*even assuming the contract of carriage [168 from and to Richmond and Hammersmith to have been made between him and the London and South Western Railway Company exclusively, the defendants are still liable in respect of the wrongful act which led to the plaintiff's injuries, by virtue of their actual reception of him in their carriage on his return journey from Hammersmith to Richmond. In arriving at a conclusion upon the validity or invalidity of this contention, it is necessary to premise the following facts. First, the accident to the plaintiff occurred as he was alighting from the carriage in which he rode on to the platform of Richmond station; secondly, the station, including the platform, is the station of the London and South Western Railway Company, but which the defendants have a right

1880

Foulkes v. Metropolitan District Railway Co.

to use in the exercise of their running powers; thirdly, the accident was due to what may be termed equally a defect in the construction of the defendants' carriage relatively to the construction of the platform, and a defect in the construction of the platform relatively to the construction of the carriage; but as at the trial the contract of carriage was treated by the Lord Chief Justice as a contract with the defendants, it was quite immaterial in which way the defect was viewed, and he accordingly put to the jury only the question whether there was negligence in the construction of the platform relatively to the construction of the carriage leading to the accident, and whether there was contributory negligence on the part of the plaintiff; and, fourthly, the finding of the jury in favor of the plaintiff, so far as those questions are concerned, is not now impugned. Starting with these premises of fact, there are certain admitted propositions of law to be borne in mind. First, a railway company issuing a ticket to a passenger for a journey partly on the company's own line and partly on the line of another company may be, and presumably is, responsible for the safety of the passenger on his whole journey, and is liable to compensate him for injuries caused to him by the negligence of railway servants or defective construction of carriages or stations, to whichever company they belong: *Great Western Ry. Co. v. Blake* (1); *Thomas v. Rhymney Ry. Co.* (2). Secondly, a railway company may under certain circumstances be subject, in favor [169] of a passenger upon such a \*journey as last mentioned, to similar responsibilities, although as between the company and the individual passenger there may have been no contract; as, for instance, in the case of a servant travelling with his master upon a ticket taken by the latter, *Marshall v. York, Newcastle and Berwick Ry. Co.* (3); or of a child of tender years travelling upon a ticket taken by its parent, and even in the case of a child above the age within which the company holds itself out as willing to carry children gratis, but taken by the mother without a ticket: *Austin v. Great Western Ry. Co.* (4). The ground upon which these further responsibilities of railway companies are rested is either that stated by Lord Blackburn, then Blackburn, J., in the last cited case, p. 445, where he says: "I think that what was said in the case of *Marshall v. York, Newcastle and Berwick Ry. Co.* (3) was quite correct. It was there laid down that the right which a passenger by railway has to be

(1) 7 H. &amp; N., 987, at p. 991.

(3) 11 C. B., 655.

(2) Law Rep., 5 Q. B., 226, in Ex. Ch.,

(4) Law Rep., 2 Q. B., 442.

6 Q. B., 266.

carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely ;" or it is that to which Lush and Shee, JJ., in the same case inclined, namely, a contract, although not a contract with the individual injured and suing. Whichever ground be taken, the responsibilities are not directly founded upon contract. But, thirdly, the responsibilities of a railway company or any other carrier may be carried still a step further. There are cases in which a carrier may be liable for injuries received by a passenger when carried by him, although no contract for carriage may exist between the carrier and the passenger or any person contracting directly for his carriage ; in *Dalyell v. Tyrer* (\*) the plaintiff had made a contract with a public ferryman under which the latter was bound to carry him daily for a certain period : the ferryman being unable, upon a particular day, to work the ferry, hired a boat and crew for the purpose, and an accident having occurred to the plaintiff through the mismanagement by the crew of a rope, the owner of the boat and crew was held liable to him. So, again, a case of *Reynolds v. North Eastern Ry. Co.* (†) decided that where a passenger took a ticket of Company A. for a journey \*over the lines of Companies A., B., [170 and C., and a collision having occurred on the B. railway by reason of the train in which the plaintiff was, running into trucks negligently left on the line, the B. Company were liable to the plaintiff in an action of negligence.

These propositions of law have not been disputed by the Solicitor-General in his arguments for the defendants in the present case, and he admits that for certain acts which he denominates misfeasances or tortious acts, the defendants might have become liable to the plaintiff, carried as he was in fact by them, but he denies that they incurred any liability in respect of the defect which led to the plaintiff's accident, whether it be treated as a defect of carriage or of platform. He attempts to draw a line in a case like the present between the commission of an act, which is in itself wrongful, and the omission of some act to which the company would admittedly be bound if the passenger were carried by them under a contract. It is, however, very difficult to see how such a line can be reasonably drawn. Suppose the carriage in which the plaintiff rode had been allowed by the neglect of the defendants to be in an insecure and dangerous condition and an accident had thereby occurred to him ; why should the defendants be the less liable

(†) 28 L. J. (Q.B.), 52.

(\*) Mentioned in Roscoe's *Nisi Prius*, 14th ed., p. 591.

1880

Wagstaff v. Anderson.

to him than if their porter had, as the train was leaving Hammersmith station, negligently shut the carriage door upon the plaintiff's fingers, in which case the Solicitor-General admits the defendants would be liable? Why again, on the other hand, if there is any duty on the part of the defendants towards the plaintiff in respect of the security of the carriage in which he rides, should there not be a duty also in respect of the safety of the place at which he is called upon to alight? I think that the true principle in such a case as the present is that the company, so far as concerns its own line, in which term I include a line over which running powers are exercised, and its own acts and omissions, is under the same obligations in reference to the security of the passenger, as it would have been if it had directly contracted with him. This principle is a reasonable one, for underlying it is the fact that more or less directly or indirectly the carrying company derives a benefit from its carriage of the passenger, and should therefore come under some corresponding obligation towards him, and what more appropriate obligation can there be than the ordinary \*one undertaken by railway companies towards their passengers, namely, that of taking due and reasonable care for their safety?

I am of opinion then that the duty of the defendants towards the plaintiff was such as I have described, and, inasmuch as upon the verdict of the jury it must be taken that the defendants failed to fulfil their duty, it follows that the judgment of the court below in favor of the plaintiff was right and should be affirmed.

*Appeal dismissed.*

Solicitors for plaintiff: *Faithfull & Owen.*

Solicitors for defendants: *Baxters & Co.*

See *ante*, p. 550 note, and *Foulkes v. Metropolitan, etc.*, *ante*, p. 536.

---

[5 Common Pleas Division, 171.]

March 1, 1880.

### WAGSTAFF and Others v. ANDERSON and Others.

*Ship—Charterparty—Contract to carry—Sale of Goods by Master of Ship.*

On the 24th of June the defendants, who were shipbrokers, wrote to the plaintiffs, offering them "room" in a ship called *F. K. Dumas* for certain cement and stone from London to Callao. On the 25th of June the defendants chartered the ship for the voyage, the charterparty providing, *inter alia*, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded at

her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; and that the charterers' responsibility, except for freight, should cease on the vessel being loaded. On the 26th of June an agreement was made between the defendants, acting for the owners of the *F. K. Dumas*, and the plaintiffs, that the former should receive on board cement and stone at certain freight from London to Callao, and sail on a certain day: freight to be paid one half on signing bills of lading, and the remainder on final discharge at Callao.

The cement and stone were shipped, the half freight paid, and the master signed bills of lading making the remainder payable at Callao. On her voyage the ship, being damaged by bad weather, put into an intermediate port, where the vessel was condemned. The master, being unable to forward the plaintiffs' goods to their destination, sold them. In an action against the defendants for their value, the jury found that the sale was not justified:

*Held*, affirming the judgment of Denman, J., that on the construction of the above documents there was no contract between the plaintiffs and the defendants for the carriage of the goods from London to Callao.

APPEAL from the judgment of Denman, J., in favor of the defendants<sup>(1)</sup>.

\*Action to recover damages for the non-delivery [172 and wrongful sale, and also for the conversion of certain railway materials shipped by the plaintiffs on board the *Francis K. Dumas* to be carried from London to Callao.

At the trial before Denman, J., at the Hilary Sittings, 1879, in London, the following facts were proved: the plaintiffs, being desirous of shipping certain stone and cement for Callao, by their brokers, Smith, Sundries & Co., entered into negotiations with the defendants Moss & Mitchell, who were ship brokers at London, and on the 24th of June, 1872, received from them a letter as follows: "We now beg to offer you room in the ship *F. K. Dumas*, hence to Callao, for 750 tons of cement at 30s. per ton and 5 per cent., 250 tons of stone at 30s. and 5 per cent. The latter not to exceed two tons in each block. The ship to receive cargo on or about the 25th of July, and to sail on or about the 25th of August next." The offer was accepted, and on the 26th of June, 1872, an agreement was entered into as follows: "It is this day mutually agreed between Moss & Mitchell acting for owners of the *Francis K. Dumas*, and Thomas Brassey & Co. (the plaintiffs), that the former shall receive on board in the London Docks 1,000 tons of cement in casks <sup>and/or</sup> stone in blocks (the latter limited to 250 tons, and no piece to exceed two tons weight), at the rate of 30s. per ton of 20 cwt., with 5 per cent. primage thereon freight from London to Callao. The ship to receive the cement on the 25th of July, and to sail on the 25th of August. The barges as they come alongside shall be immediately discharged, say within the usual seventy-two hours, or Moss & Mitchell

(1) 4 C. P. D., 283; 30 Eng. R., 550.

1880

Wagstaff v. Anderson.

undertake to pay demurrage on barges. The cargo to be received at Callao as customary; freight to be paid as follows—say one half on signing bills of lading less two months discount at 5 per cent. per annum, and the remainder on final discharge at Callao. Brassey & Co. to have the option of shipping two boats not exceeding two tons each. Penalty for non-performance of this agreement £1,500.”

On the 25th of June, 1872, the defendants Anderson & Co. had effected a charter of the ship *F. K. Dumas*, in which the defendants Moss & Mitchell were joint adventurers. The material parts of the charterparty provided as follows: “It [173] was agreed between \*the master on the part of the owners of the ship *F. K. Dumas* and Anderson & Co. (the defendants), that the ship should perform a voyage from London to Callao; that she should receive on board at such loading berth as the charterers might appoint all such lawful goods as might be required; that the whole ship should be at the disposal of the charterers for the conveyance of goods, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect remain responsible to all whom it might concern, as if the ship were loaded at her berth by and for the owners independently of the charterers; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice; that the ship should be addressed to the charterers’ nominees at the port of discharge; that the ship, being loaded, should proceed to Callao, and deliver the cargo agreeably to bills of lading in the usual and customary manner, the act of God, &c., excepted; the total freight for the use and hire of the ship, £2,500, to be paid as follows, against captain’s order, viz., by charterers’ acceptances payable at ninety days from the ship’s final sailing from Gravesend, or in cash at £5 per cent. discount at captain’s option. But the owners to accept in satisfaction of freight all bills of lading bearing freight payable abroad, not exceeding one-third of the amount of the charter. The charterers’ liability, except for freight, to cease on the vessel being loaded.”

The plaintiffs shipped on board the *F. K. Dumas* 750 tons of cement and 250 tons of stone, two boats, and a bundle of oars, for which the master signed bills of lading “to be delivered at Callao unto order or their assigns on paying freight of the goods £786 17s. 6d.”

The half freight, minus 5 per cent. discount, amounting to £780 6s. 1d. was paid by the plaintiffs to the defendants, leaving the bill of lading freight to be paid at Callao.



The vessel, in prosecuting her voyage, was compelled to put in at Monte Video, where she was condemned, and the goods shipped by the plaintiffs sold by the master, it being impossible to forward them to their destination. On these facts the jury, under direction of the learned judge, found that the master was \*not justified in selling the goods, [174 and assessed the damages at £1,445. The learned judge, after further consideration, directed judgment to be entered for the defendants, on the ground that the master in selling the goods was not acting as the servant or agent of the defendants, and that therefore they were not liable.

From this judgment the plaintiffs appealed.

Feb. 27, 28. *W. Williams, Q.C., A. L. Smith, and Hollams*, for the plaintiffs, contended that, under the document of the 26th of June, the defendants contracted with them to carry the goods to Callao; that the bill of lading was at most evidence of a contract, and that it did not in any way supersede the contract of the 26th of June, but carried out its intention, and operated only as an acknowledgment that the master should not retain the goods for a sum beyond the bill of lading freight; that the defendants, by virtue of the documents of the 25th and 26th of June, were the owners of the ship for the voyage, and the master must be deemed to have been their agent; the defendants, therefore, having contracted to carry the goods to Callao, as an incident of the contract had undertaken to take care of the goods on the voyage, perils of the sea only excepted; that if the vessel became unable to prosecute her voyage, the obligation to take care of them did not cease; the master was bound not to sacrifice the goods intrusted to him; they were not of a perishable nature, and there was no necessity to have sold them; and he being the defendants' agent, the defendants were liable.

March 1. *Butt, Q.C., Cohen, Q.C., and J. C. Mathew*, for the defendants, contended that, on the true construction of the documents of the 25th and 26th of June, the contract to carry was with the shipowners, and that the contract of the 26th of June was made by the defendants, not on behalf of themselves, but for the shipowners—at all events the contract was at an end when the goods were received on board the ship; that the master was the servant and agent, not of the defendants, but of the shipowners.

The cases cited were those mentioned in the judgment of the court.

1880

Wagstaff v. Anderson.

BRAMWELL, L.J.: I am of opinion that the judgment of 175] \*Denman, J., ought to be affirmed. The first ground on which it must be affirmed is one which has scarcely been mentioned, but which has occurred to me. The document of the 26th of June, 1872, is on the face of it an agreement by Moss & Mitchell, acting not on behalf of themselves but "acting for the owners of the F. K. Dumas." In some cases it has been held that the description "as agent" is not conclusive against personal liability, although the signature has been professedly "as agent," but I think that those cases cannot be applicable to one of this kind. Moss & Mitchell are shipbrokers, and shipbrokers usually do not act for themselves; it then becomes manifest upon the face of this agreement that Moss & Mitchell are not professing to bind themselves, but are acting for the owners of the F. K. Dumas. I know that the document contains a clause that the barges, as they come alongside, shall be discharged immediately within the usual seventy-two hours, or Moss & Mitchell undertake to pay the demurrage, but I think that means Moss & Mitchell, acting as agents, undertake. As they are not principals, the only action that could be maintained against them would be that they professed to have an authority which they really did not possess. An agent who has no authority to make contracts cannot be sued as a principal. This is not one of those contracts in which there is a personal consideration; it is not as if the contract was, "I will deliver to you a quantity of coals for my principal;" in that case nothing turns upon the liability of the principal, and the character of the principal; but it is a different thing where the agent pledges the ship and the credit of the shipowner from where he pledges his personal liability. It seems to me, therefore, that the document, on the face of it, purports not to bind the defendants as principals, but purports to bind the ship.

It is said that the defendants are acting for the ship and shipowners, and that an action could be maintained against them if it turned out that they had some interest which might have enabled them to enter into a contract to carry. I think it is impossible to hold, on the face of this agreement, that they in any sense undertook that they would carry.

If, however, even that difficulty were got over by the plaintiffs, the defendants, at all events, are entitled to say, 176] "What have we \*undertaken to do that we have failed to do?" The agreement states, "It is this day mutually agreed between Moss & Mitchell, acting for owners of the Francis K. Dumas, and Thomas Brassey & Co. (meaning

thereby the plaintiffs), that the former," that is, the owners of the ship, "shall receive on board, in the London Docks, 1,000 tons of cargo, as a certain rate of freight, from London to Callao." They have done so. "The ship to receive the cement, &c., on or about the 25th of July, and to sail on or about the 25th of August." Then there is this stipulation, "The barges as they come alongside shall be immediately discharged, say within the usual seventy-two hours, or Moss & Mitchell undertake to pay demurrage on barges." If Moss & Mitchell had not had authority to enter into that stipulation possibly as to that the plaintiffs might have said, "You have no authority to bind your principals to the entirety of this agreement, we will have nothing to do with it, and we will bring an action against you for representing that you had authority;" but I am inclined to think they had authority because they were shipbrokers, and they might specify the time within which barges should be unloaded. Further than that, no difficulty has arisen in consequence of that clause. Then the agreement goes on, "The cargo to be received at Callao as customary; freight to be paid as follows," and so forth. Every word of that agreement has been complied with by the defendants. I cannot see, therefore, that the plaintiffs can have any right to maintain the action, which is an action whereby they say—setting out in their statement of claim the charterparty, because unless they did they could not contend that this was a contract by the defendants to carry—"The defendants thereupon for the purposes of loading the ship at freights to be paid to them, and of making profit out of the said ship, put the said ship up as a general ship to convey goods on the voyage as aforesaid, and contracted with the plaintiffs amongst other persons as follows," then they set out that letter, and they say, "The said defendants entered into the said agreement on their own behalf and for their own purposes, and not for the shipowners as therein alleged." I think they can have no possible right to state that. But it is said on behalf of the plaintiffs, to whom is the freight payable? My answer to that is that the freight is payable to the shipowners. Then this difficulty \*was put: supposing the plaintiffs, [177 when the ship had got out to Callao, had refused to receive the goods and pay the freight, who could have maintained an action against them? My answer to that is, the shipowners could have maintained the action, and it was intended that the shipowners should maintain the action. It is true that the freight the shipowners received would be something other than which the freighters would pay, but

1880

Wagstaff v. Anderson.

that was matter of arrangement between the shipowners and the defendants, and although I do not like to invent trusteeships, I do not think that any necessity for that exists here, because they have so arranged the figures as far as this particular lot is concerned—at least, I suppose they have—one does not know the whole of the story about the other goods which may have been sent out—that the only persons who have any interest in the receipt of these bills of lading are the shipowners, so that there is no necessity to invent what otherwise there would be no difficulty in inventing, a supposed trusteeship. I say no difficulty in inventing, because if it should turn out that the shipowners received over the lump freight, why then it would be a matter of arrangement between them and the charterers, the defendants, that they should pay it over.

I desire to say that I have not the slightest misgiving as to the propriety of *Colvin v. Newberry* (\*). I think it was rightly decided. I do not think that because a bill of lading is signed by the captain as agent for the ship, a contract is made between the shipowner and the freighter, the freighter having previously arranged with the charterer that the charterer shall carry his goods. I think that the remedy of the freighter would be against the charterer with whom he made the contract of affreightment, and that he would not get an additional remedy because he had taken a bill of lading from the shipowner. It is sometimes said a bill of lading contains a contract. Such is the language of the act of Parliament, 18 & 19 Vict. c. 111, and in many instances it is accurate enough, but to say that it is a contract superseding, adding to, or varying the former contract under the charterparty, is a proposition of law to which I never can consent.

I am by no means clear that if this contract to carry had [178] been \*between the charterers and the plaintiffs, the charterers would have been liable for the misfeasance of the captain, although acting within the scope of his authority, in such a way that the owners would have been bound. I express no opinion on the subject. It might be that the owner, as was held in *Evbank v. Nutting* (\*), is liable to the shipper, but it may be also that he would be liable to the charterer, the charterer being bound, in the interest of those with whom he had entered into some contract of affreightment, to seek his remedy against the owner or captain, or both, and then to account to those with whom he had entered into some contract, though not liable as he is sought

(\*) 7 C. B., 797.

(\*) 1 Cl. &amp; F., 283.

to be made here, as though the misfeasance had been his or his agent's act within the scope of his authority. I give no opinion upon that at all. Upon the other ground I think the judgment should be affirmed.

BAGGALLAY, L.J.: I agree in thinking that the judgment of Denman, J., should be affirmed.

The first question is, what were the relations between the plaintiffs and the defendants? The answer to that question depends upon what is the construction which ought to be put upon the agreement of the 26th of June, 1872. That agreement taken by itself appears to me to be nothing more than an agreement entered into by the loading brokers on behalf of the owners of the ship, whoever those owners may be, and, so far as there was any contract entered into by the defendants as regards their own acts, I think that that contract is limited in the manner expressed by Denman, J., in the court below. He said: "It appears to me that it (the document of the 26th of June) merely amounts to a contract that the owners of the ship shall receive the goods on board and enter into contracts by bills of lading to carry them at certain rates of freight; and that the ship shall sail on or about a certain day named; and that the defendants will pay certain demurrage if the barges are delayed" (').

If there is any latent ambiguity arising out of the terms in which the contract is expressed, I think, directly we look at the letter of the 24th of June, which preceded that contract, we have the strongest evidence that the contract was only intended to be \*a broker's contract, for it was on one [179 of the printed forms used by the shipbrokers, and was addressed to the brokers of the shipper, and merely amounted to an offer of room for a certain amount of tonnage at a certain freight. If that is the true construction of the contract, what rights have the plaintiffs in respect of it if there has been any breach? If the contract was not authorized by the owners, their rights would simply be an action for damages in respect of the misrepresentation. It could in no respect have the effect of putting the defendants into the position of owners of the ship, so as to make them responsible for the acts of the master; and, as regards that particular part, if it did amount to a contract on the part of the defendants that they would receive the goods in the sense I have just referred to, it is not suggested that they ever committed a breach of any undertaking on their part.

Then it is said on the part of the plaintiffs, construing that as a contract on behalf of the owners, having regard to

(') 4 C. P. D., at p. 289; 30 Eng. Rep., 555.

all the circumstances of this case, and to what had taken place between the shippers and Moss & Mitchell and Anderson & Co., they had become *quasi* owners, that is, owners of the ship for this particular voyage, and that therefore the contract of the 26th of June, which was a contract entered into by them on behalf of the owners, was a contract entered into on their own behalf, and in respect of which they are liable. I think that the terms of the charterparty entirely negative any such idea. The effect of the charterparty is, that the shipowners accept from the brokers a lump sum of £2,500 in respect of the freight which was to be earned upon this particular voyage, leaving the shipbrokers to make a profit or sustain a loss according to the actual return which should be made, and in every other respect leaving the owners and the master of the ship to act as if there had been no arrangement come to.

It appears to me, therefore, that the contention that the defendants are to be considered as the true owners of the ship, and as the persons who are to be sued under the agreement of the 26th of June, 1872, must fail.

THESIGER, L.J.: I am also of opinion that the judgment of Denman, J., must be affirmed.

The plaintiffs contend that the defendants are responsible [80] for \*the act of the master of the ship in selling the goods at Monte Video on the grounds, that the master in selling was the agent of the defendants, that being agent of the defendants he was acting within the general scope of his authority, and that consequently, although in this particular case the sale was and has been found by the jury to be unjustifiable, yet the defendants are responsible for the act of their agent upon the principle laid down in *Eubank v. Nutting* (1) and similar cases. This contention involves several propositions. The plaintiffs have to make out that the master was the agent of the defendants, and I am of opinion that in this they have failed. The goods, the sale of which is the subject of dispute, were carried under a bill of lading, and *prima facie* the master in signing that bill of lading would be acting on behalf of the persons who were the shipowners, and the shipowners would be the persons responsible for the carriage of the goods, and for all things to which the agent would be able to bind the shipowners in connection with the goods. But it is open to the plaintiffs to negative the presumption of the liability of the shipowners in two ways—either by showing that the transactions between the shipowners and the defendants were such as really put the de-

(1) 7 C. B., 797.

fendants for that particular voyage in the position of the shipowners, according to the principles laid down in *Colvin v. Newberry* (<sup>1</sup>), or that, although the transactions between the shipowners and the defendants did not put the defendants in the position of shipowners, yet they had so conducted themselves, or so contracted with the shippers of the goods, as to make themselves personally responsible.

First, have the plaintiffs made out that as regards the real transaction between the shipowners and the defendants, the defendants for the purposes of this particular voyage were put in the position of the shipowners? I think that they have not. There are no doubt expressions in the charterparty—for instance, the paragraph which speaks of the use and hire of the ship, and the paragraph which speaks of the whole of the ship being at the disposal of the freighters for the conveyance of the goods—which taken by themselves would seem to involve the idea that the defendants for the particular voyage were to be put into the \*position [181 of the shipowners; but when the whole document is examined it is apparent that that was not the intention of the parties. There is one clause in the agreement which distinctly negatives the idea that the defendants were to be put into the position of the shipowners, I mean the clause which provides that the master and owners of the said ship shall give the same attention to the crew, and shall in every respect be and remain responsible to all whom it may concern, as if the said ship were loaded on the berth by and for the account of the said owners independently of this agreement, and then at nearly the close of the charterparty there is a provision, which perhaps taken by itself would not necessarily negative the liability of the defendants as shipowners, but is very important in favor of the view of the defendants when read with the clause to which I have just referred; being the provision, "That the charterers' responsibility under this charterparty, except for freight as provided, shall cease on the vessel being loaded."

What, shortly, is the meaning of that document? We have in this case foreign shipowners. They have their ship in the port of London, and are anxious to obtain a full cargo for that ship. They deal with a London firm of shipbrokers, men to whose responsibility they may very well look, and they might reasonably argue, "There is a real risk if we put up our ship as a general ship of not obtaining a full cargo, but if we can get a shipbroker of responsibility to guarantee

(<sup>1</sup>) 1 C. & F., 283.

1880

Wagstaff v. Anderson.

us a certain lump freight, he taking the chances of filling up the ship in such a way as to get a freight beyond that lump freight, we shall be quite ready, for that lump freight, to come under all the responsibilities and liabilities which shipowners ordinarily come under." That seems to me—apart from any question of custom which has not been proved—to be a reasonable agreement, and one which, judging from its language, the parties contemplated and entered into. That disposes of the point as to whether the real transaction was such as to substitute the defendants for the shipowners.

But, secondly, the defendants might have so conducted themselves and so contracted with the shipowners as to take upon themselves the responsibilities of a shipowner. I think they have not done so. Moss & Mitchell themselves were [82] shipbrokers \*on whose behalf jointly with Anderson & Co. the charterparty was executed by Anderson & Co.; and undoubtedly if the letter of the 24th of June is to be looked at as part of the contract between the parties, that letter very strongly shows that Moss & Mitchell were not acting on their own behalf, but were acting as brokers for the ship and for the shipowners; at the same time we have no right to look at that letter if the agreement or the arrangement of the 26th of June, 1872, was a complete contract for carriage. We could only then use the previous letter as possibly explaining some latent ambiguity in the agreement; but I am of opinion that this agreement of the 26th of June, 1872, does not constitute a complete contract for carriage. It constitutes an arrangement under which Moss & Mitchell dealing with the plaintiffs provided for the goods being received on board with the intention common to both parties, and to be collected from the language used, that when the goods were received on board they should be carried in the ordinary way in which goods are carried under a bill of lading, which, although not absolutely the contract, is at all events evidence of a contract by the shipowners under which the goods are carried. It seems to me immaterial to decide whether this document signed as it is absolutely by Moss & Mitchell, although in the body of the document they speak of themselves as acting for the owners, does or does not bind them. The matter may be put thus: If it binds them, it binds them to nothing which happens after the goods have been received on board. If it does not bind them *cadit questio*. Therefore, it comes to this, that the goods were not carried under any contract under which Moss & Mitchell, or Anderson & Co., were personally liable, but were carried under the bill of lading signed in the ordinary way



by the captain of the ship, and binding as between the plaintiffs and the shipowners, whose captain he was.

It appears to me clear that the master in whatever he did at Monte Video, was not acting for the defendants, and did not render them responsible.

*Judgment affirmed.*

Solicitors for plaintiffs: *Parker & Co.*

Solicitors for defendants: *Hollams, Son & Coward.*

[5 Common Pleas Division, 266.]

May 6, 1880.

\*CHESWORTH V. HUNT and Another.

[266

HARRISON, Claimant.

*Bill of Sale—Consolidation of Mortgage with—Execution Creditor—Right to Surplus Proceeds of Goods after discharging Bill of Sale.*

The doctrine of consolidation of mortgages does not enable the grantee by a registered bill of sale of goods seized under a *fi. fa.* to tack a prior mortgage of other property of the grantor, and claim that the surplus proceeds of the goods, after discharging the sum secured by the bill of sale, shall be applied in satisfaction of the prior mortgage, so as to defeat the right of the execution creditor to such surplus,

SPECIAL CASE stated by order of the district registrar for Liverpool.

By an indenture dated the 1st of May, 1879, and made between the defendants of the one part and the claimant of the other part, the defendant, George Hunt the elder, conveyed to the claimant leasehold premises, and the defendants conveyed to the plaintiff freehold premises for securing £235 17s. 5d. then due to the claimant from the defendants, and also the amounts of three bills of exchange, and also such other moneys as might be advanced by the claimant to or on account of the defendants or become due from the defendants to the claimant, and the deed contained a proviso for reconveyance on repayment of the sums and amounts aforesaid.

The defendants did not pay the bills of exchange, and the claimant was holder thereof, and all the sums mentioned in the mortgage were due and owing from the defendants to the claimant, together with further advances.

By indenture or bill of sale dated the 25th of September, 1879, and made between the defendants of the one part and the claimant of the other part, in consideration of £40 the defendants assigned to him all the machinery, plant, stock-in-trade, and other articles then in or about the yard and shop of the defendants, 133 Grafton Street, Liverpool, and

1880

Chesworth v. Hunt.

particularly specified in the schedule thereto; and the bill of sale contained a proviso for reassignment on repayment of the £40 with interest.

The bill of sale was duly registered on the 27th of September, 1879.

267] \* The defendants remained in possession of the goods comprised in the bill of sale, and on the 1st of October, 1879, the same were seized under a writ of fi. fa. issued upon a judgment obtained by the plaintiff in this action. The writ of fi. fa. was indorsed to levy £49 19s., including costs of levy.

The claimant thereupon claimed the goods as his by virtue of the bill of sale, and the sheriff took out an interpleader summons, which was heard before the district registrar, who ordered that the sheriff should sell the goods without prejudice to any question, and after deducting expenses of sale should pay £40 and interest to the claimant, and the balance of the sale moneys into court, and that the plaintiff and claimant should state a special case, as to whether the claimant was at the time of the levy entitled to a lien or charge or right to consolidate upon the goods seized in respect of his securities other than the bill of sale.

The sheriff accordingly sold the goods, and out of the proceeds paid to the claimant £40 2s. 3d., and paid into court the balance of £44 8s. 6d.

The claimant claimed that he was at the time of the levy entitled to consolidate the securities created by the indentures of the 1st of May and the 25th of September, 1879, and that the defendants were not at the time of the levy entitled to redeem the security created by the bill of sale, without at the same time redeeming the security created by the indenture of the 1st of May, 1879, and that the plaintiff and the sheriff could be in no better position in that respect than the defendants, and therefore were not entitled to sell or deal with the goods comprised in the bill of sale, except upon the terms of their previously redeeming both of the claimant's said securities.

The claimant contended that the sum of £44 8s. 6d. in court, subject to the payment of costs, ought to be paid to the claimant in reduction of the principal and interest due to him and secured by the indenture of the 1st of May, 1879.

The amount due to the plaintiff under the judgment exceeded £44 8s. 6d., and he disputed the claimant's right as against the plaintiff to consolidate the securities, and denied that the bill of sale was, at the time of the levy, as

against him, the execution \*creditor, a greater secu- [268  
rity over the goods and chattels comprised therein than was  
expressed in the bill of sale, and claimed that the moneys in  
court ought to be paid to the plaintiff in part satisfaction  
of his judgment.

The question was, in what manner ought the proceeds in  
court of the sale of the goods comprised in the bill of sale  
to be applied as between the claimant and the plaintiff.

A. *Leach*, for the claimant: According to the doctrine of  
consolidation the claimant is entitled to tack his mortgages  
and to insist that one shall not be paid off without the other:  
Fisher on Mortgage, 3d ed., p. 639; *Marsh v. Lee* (\*). The  
rule applies to equitable mortgages, such as his first one  
was, and whether the mortgagee is coming to foreclose or  
the mortgagor to redeem. "The incumbrancer may also  
unite securities of different natures, as an assignment of  
equitable personalty with a mortgage upon freeholds and  
leaseholds": Fisher on Mortgage, 3d ed., p. 639, and in a  
note the author says there seems no doubt on the point:  
*Watts v. Symes* (\*); *Farebrother v. Wodehouse* (\*); *Spald-  
ing v. Thompson* (\*); *Selby v. Pomfret* (\*). "An equitable  
mortgagee has the same protection as any other *cestui que  
trust* against the subsequent judgment creditor, because a  
judgment creditor takes the property of his debtor subject  
to all the equities which affect it, including the rights of an  
equitable mortgagee; which are absolute and complete as  
between himself and the mortgagor . . .": Fisher on  
Mortgage, 3d ed., p. 665; *Langton v. Horton* (\*). There is  
no hardship on the execution creditor, who must be assumed  
to have known that his rights were liable to the contingency  
of the coalescing of the two mortgaged estates. See per  
Wood, V.C., in *Beevor v. Luck* (\*).

The Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, does not  
expressly overrule the doctrine of consolidation, which apart  
from that act would clearly apply. The plaintiff intimates  
that he will rely on ss. 8, 10 and 15. The requirements of  
s. 8, that the bill of sale "shall set forth the consideration"  
have been complied \*with, for the consideration was [269  
the £40 and not the past debt, although directly the bill of sale  
was given the right to tack arose. The principle of consoli-  
dation creates no "defeasance" or "condition" within the  
meaning of s. 10, subs. 3. Nor do the terms of s. 15 apply.

(\*) 2 Vent., 337; 1 W. & T. L. C. (5th  
ed.), 674.

(\*) 1 De Gex, M. & G., 240.

(\*) 23 Beav., 18.

(\*) 26 Beav., 637.

(\*) 3 De Gex, F. & J., 595.

(\*) 1 Hare, 549.

(\*) Law Rep., 4 Eq., 537, at p. 546.

Moreover, they are permissive and not peremptory. The words in the interpretation clause, s. 4, that "bill of sale" shall include "any agreement . . . by which a right in equity to any personal chattels or to any charge or security thereon" were not meant to apply to this case, but to such an one as *Langton v. Horton* <sup>(1)</sup>; and *Ex parte Conning, In re Steele* <sup>(2)</sup>; *Ex parte Mackay, Ex parte Brown, In re Jeavons* <sup>(3)</sup>. A bill of sale does not merely confer a right in equity but is a legal mortgage. The act does not impliedly overrule the doctrine of consolidation. There is nothing in the policy of the act to do so. But if there were, the doctrines of equity sometimes infringe upon the policy of statutes, as for example on the Statute of Frauds and the Registration Acts: See notes to *Le Neve v. Le Neve*, 2 W. & T. L. C. (5th ed.), at p. 45.

The claimant is entitled to have the money paid over to him to be applied *pro tanto* in satisfaction of the prior securities. Why should an execution creditor who is merely a general creditor be preferred to a secured creditor who has been most diligent? One of the two must suffer. It is just that the loss should fall on the former.

*Efrench*, for the plaintiff, was not heard.

DENMAN, J.: Our judgment must be for the execution creditor, notwithstanding the able argument of Mr. Leach, who has doubtless brought before us all the authorities which bear on the case. The claimant's whole title is derived from a registered bill of sale held by him, and under which he claims all the goods and chattels in possession of the judgment debtors at the time when the *fi. fa.* was executed. The proceeds of those goods are more than sufficient to satisfy his bill of sale, and it is admitted that he is entitled to realize the amount secured by the bill of sale.

270] \*But he argues that he is entitled, not only to the amount due under the bill of sale, but also to satisfaction out of those proceeds, so far as it can be got, for moneys due on the security of freeholds and leaseholds contained in a mortgage granted to him some time before the execution of the bill of sale. I think that we could not yield to this contention without entirely ignoring the whole spirit, substance, and meaning of the provisions of the Bills of Sale Act, 1878. His title is under the bill of sale, and if there were no bill of sale he would have had no right to touch the goods. They were not secured to him by any other instrument. But he contends that the doctrine of consolidation

<sup>(1)</sup> 1 Hare, 549.

<sup>(2)</sup> Law Rep., 16 Eq., 414.

<sup>(3)</sup> Law Rep., 8 Ch., 643.

applies. That doctrine is somewhat unfamiliar in these courts; but fortunately my learned brother Lindley, who is as familiar with equity as with law, now sits beside me, and he will give his reasons for our judgment that the doctrine does not apply to this case. Assuming, however, that the doctrine might apply as between the execution debtors and the claimant, I think it by no means follows that where a claim is made under a bill of sale of goods, the claimant can necessarily get satisfaction out of those goods for sums which he has secured on real property by documents not affecting those goods. The Bills of Sale Act requires several conditions to be fulfilled in a valid bill of sale. The consideration must be truly set forth. In the bill of sale here the consideration is truly stated, and it would be a qualification of that statement if under the doctrine of consolidation the claimant were held to have a right to more than the sums stipulated for in the instrument. That certainly could not have been contemplated by the Legislature when passing the act. Then, again, the provisions in the early part of the act defining a bill of sale, are wholly inconsistent with its being used for such a purpose as that for which the claimant seeks to use it. A bill of sale is according to the definition clause a document relating to personal chattels, and is to include certain things, but to exclude leaseholds and real estate. So if it were to have the effect which the claimant desires in the present case the scope of the act would be altered. I decline to be party to extending the operation of the act to such a case as the present unless compelled by authority applicable to it. On that ground alone I think our judgment should be for the execution creditor.

\*LINDLEY, J.: I am of the same opinion. With- [271  
out commenting on the propriety of the equitable doctrine of consolidation of mortgages, I take that doctrine as established; it has been settled a great number of years and now is not to be contradicted in courts of first instance or county courts; it is part of the law of the land. But, when asked to extend the doctrine, we must be cautious, and if asked to extend it so as to defeat the operation of an act of Parliament, and especially the Bills of Sale Act, we must be still more cautious. The principle of the doctrine is that a person who comes into equity must do equity, and if he has a mortgage of £300 on one estate and £600 on another, and the time of redemption being past, the mortgagor comes to equity to redeem or the mortgagee to foreclose, the mortgagee is entitled to say, "I will not part with one estate until I am paid all owing to me on both." Of course he

1880

Chesworth v. Hunt.

cannot say so if the mortgagor comes within the time limited by the deed for payment, in which case the equitable doctrine has no application, but if he has allowed that time to pass, and has no legal rights, then the equitable doctrine applies. True, on logical reasoning the doctrine of consolidation has been extended step by step until it has produced results which are to my mind monstrous; but still we cannot flinch from it, it is not our province to repeal or alter the law. Here, however, where a bill of sale is executed for £40 and registered so as to be binding to that extent against execution creditors, and the security is worth more than the £40, so that there is a surplus, after paying off the bill of sale holder, for the execution creditor, we are asked to say for the first time that the execution creditor is not to have the surplus proceeds of the execution, because the holder of the bill of sale is the holder of another security on other property of the grantor. That seems so startling that I decline to take such a step except under pressure of superior authority. I will not be the first to take it. No authority exists which goes to that length or nearly so far. Therefore, I should say without hesitation, that we ought not to defeat an execution creditor by extending against him the doctrine of consolidation of mortgages when we see, as I do plainly, that it would be contrary to the scope of the Bills of Sale Act. It is unnecessary to go through the sections to show that we should \*render the act nugatory in such a case as the present, where the bill of sale holder happens to have another security on land of the grantor, if we held that the securities might be consolidated so as to defeat the rights of an execution creditor who has seized the goods comprised in the bill of sale, which are more than enough to satisfy the amount due under it to the holder.

*Judgment for the plaintiff with costs.*

Solicitors for plaintiff: *Gregory, Rowcliffe & Co.*

Solicitors for claimant: *Prior, Bigg & Co.*

[5 Common Pleas Division, 280.]

Dec. 17, 1879.

[IN THE COURT OF APPEAL.]

**\*PHILLIPS V. THE LONDON AND SOUTH WESTERN [280  
RAILWAY COMPANY.***Measure of Damages—Railway Accident—Loss of Profits of Trade or Profession—  
Misdirection.*

In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice.

**ACTION** to recover damages for personal injury sustained by the plaintiff, a medical practitioner of eminence, through the negligence of the defendants' servants. The accident occurred in December, 1877.

At a trial before Field, J., the jury awarded the plaintiff £7,000 damages. The Queen's Bench Division directed a new trial, on the ground of the inadequacy of the damages, conceiving that the jury had failed to take into account all the heads of damage in respect of which the plaintiff was by law entitled to compensation; more especially the pecuniary loss, which he had sustained through his inability to practice his profession: *Phillips v. South Western Ry. Co.* ('). The decision of the Queen's Bench Division was affirmed by the Court of Appeal (').

The second trial took place before Lord Coleridge, C.J., during the present sittings at Westminster, when the jury awarded the plaintiff £16,000. There was evidence that the plaintiff had a large private income.

In the course of his summing-up Lord Coleridge told the jury that, as there was no answer to the charge of negligence, the action was practically an assessment of the damages, which it was fair and reasonable that the defendants should pay to the plaintiff, by way of compensation for the injury which he had sustained: the amount of compensation was to be such as, the jury might think, would be fair and reasonable: it was difficult to lay down a \*definite rule, [281] and the jury must determine the amount in the best manner in which they could. An absolute compensation was not the true measure of damages; they must be fair and reasonable. Compensation was made up of several ingredients,

(1) 4 Q. B. D., 406; 28 Eng. R., 844.

(2) 5 Q. B. D., 78; 29 Eng. R., 177.

and in arriving at the total amount certain elements must be taken into account. One of these was the bodily pain and suffering, which the plaintiff had endured. Another, which might be termed a basis, was the loss of his professional income during the space of two years. For about three years before the accident the net annual earnings of the plaintiff had been about £5,000. But in this amount large presents or special fees from different patients were included, and it had been contended that these amounts were not likely to recur; but it was not likely that the confidence or generosity of the plaintiff's patients would have diminished; the patients might have continued to make presents of a similar amount, and if they should cease to do so, they would probably be followed by others equally generous; but this was a matter for the jury to decide. The plaintiff's income had been £5,000 a year on the average, and his practice had been increasing; from the time of the accident he had earned nothing, and for this, very considerable compensation must be paid by the company. As to the amount of compensation to be awarded for the loss of future income, the jury must take into consideration the probability that for a year and a half or two years more the plaintiff would be debarred from following his profession. The negligence of the defendants had for a considerable time prevented the plaintiff from following his profession, and he would probably be prevented from resuming practice for some time to come.

Dec. 6. *Ballantine, Serjt. (Dugdale, with him)*, for the defendants, moved for a new trial on the ground of misdirection, and also on the ground that the damages were excessive. The Lord Chief Justice misdirected the jury by omitting in his summing-up to call their attention to the fact, that the plaintiff was, at the time of the accident, in the receipt of a private income, irrespective of the earnings derived from his professional practice, of between £3,000 and £4,000 a year.

[GROVE, J.: On the first trial my Brother Field admitted 282] the \*evidence, but suggested to the jury that, though they might take that fact into their consideration, they must not give too much effect to it ('), and the Queen's Bench Division did not say that he was wrong. But I have grave doubts whether that was admissible at all. At all events, I am clearly of opinion that the omission to enlarge upon it to the jury does not constitute a misdirection.

LOPES, J.: I do not understand this fact to have been

(') See 5 Q. B. D., 82; 29 Eng. R., 181.



withdrawn from the jury on this occasion. In strict law, I do not see how it could be made evidence.]

The damages here given are based upon an estimate of the loss of profits from the plaintiff's professional practice. That is not a rational and legitimate consideration for a jury in estimating the damages to be awarded for an accident of this kind; otherwise the sum to be awarded to a poor east-end apothecary of limited practice would be no adequate compensation for the loss and suffering which he would endure, and that without the sources of alleviation which would be at the command of a rich west-end physician. Assuming, however, the loss of profits to be an element which may be taken into account, there was nothing in this case to warrant the jury in giving such an extravagant sum as that awarded here,—assuming it to be true that the plaintiff's professional earnings in 1875, 1876, and 1877, averaged £5,000 a year. The jury were bound to take a reasonable view of all the circumstances, and should have limited their verdict to the sum which the defendants ought in fairness to be called upon to pay for the default of their servants, in a case where both the litigants were equally free from blame. It was a strong thing for the court to interfere in a case where a jury had given so large a sum as £7,000, and there was no suggestion that they were in any way misled or that they had acted hastily or perversely.

[GROVE, J.: The Queen's Bench Division said the jury were wrong. We must assume that they thought the damages given on the first occasion were considerably too small<sup>(1)</sup>.]

LOPES, J.: It must be remembered also that the Court of Appeal was party to that strong decision<sup>(2)</sup>.

\**Hadley v. Baxendale* <sup>(3)</sup>, and *Theobald v. Railway Passengers Assurance Co.* <sup>(4)</sup>, were referred to.

GROVE, J.: I am of opinion that there should be no rule in this case. The Lord Chief Justice is not dissatisfied with the verdict, though he has expressed his willingness to have the principle, upon which the measure of compensation in these cases has usually been assessed, reconsidered upon the grounds suggested by my Brother Ballantine. There is nothing to show that the Lord Chief Justice laid down the rule here in a manner different from that in which it has been laid in former cases, which are very numerous. The plaintiff is entitled to receive at the hands of the jury com-

<sup>(1)</sup> 4 Q. B. D., 406; 28 Eng. R., 844.

<sup>(2)</sup> 5 Q. B. D., 78; 29 Eng. R., 177.

<sup>(3)</sup> 9 Ex., 341.

<sup>(4)</sup> 10 Ex., 46.

1879

Phillips v. London and South Western Railway Co.

pensation for the pain and bodily suffering which he has undergone, for the expense which he has been put to for medical and other necessary attendance, and for such pecuniary loss as the jury (having regard to his ability and means of earning money by his profession at the time) may think him reasonably entitled to. Now, looking to the condition of this gentleman,—a professional man whose earnings when in his usual state of health averaged £5,000 per annum,—and taking into consideration that the injury which he has sustained will in all human probability deprive him of the power of ever resuming his practice, and looking at the expense he has been put to in endeavoring to procure some alleviation of his sufferings, I cannot say £16,000 is too large a sum for the jury to award. If any principle could be laid down in the Court of Appeal, or by the House of Lords, or by the Legislature, for ascertaining and determining the extent to which railway companies are to be held responsible in damages for such accidents, it might possibly be desirable. But we cannot deviate from the course adopted on former occasions in reference to these matters. As to the suggestion made by the learned serjeant, of the greater comparative hardship in the case of a poor apothecary, as contrasted with that of the opulent west-end physician, I can only observe that damages are awarded as a compensation for the injury and loss which the plaintiff has sustained; they are not to be given from motives of charity and compassion.

284] \*As to the other point, the only shadow of misdirection suggested is, that the Lord Chief Justice omitted to point out in a prominent manner to the jury that the plaintiff was possessed of a private income of £3,000 or £4,000 a year. As I had already said, I have very grave doubts whether that was properly a matter which the jury could take into consideration at all. My Brother Field, it seems, admitted evidence of that fact on the former trial, and the court did not say that he had done wrong. But certainly my Lord's abstinence from adverting to it in his summing-up was no misdirection. Upon both grounds, therefore, I think there should be no rule.

LOPES, J.: I also am clearly of opinion that, according to the law as it now stands and as it has been established by a long series of authorities by which we are bound, there has been no misdirection here, and the damages have been assessed upon the proper principle, and are not excessive. Great anxiety, no doubt, exists in the minds of many persons that there should if possible be some uniform and well-

defined principle, upon which to estimate the compensation in damages to be paid by railway companies and others in cases of this kind. But we cannot speculate upon that. All we have to ascertain is, what is the existing law upon the subject. The plaintiff, besides a reasonable sum for the pain and suffering he has endured, and the expense he has incurred for medical and other necessary attendance during the period of his illness, has always been allowed to recover a fair recompense for the loss of profits of his profession or business during his enforced absence from it, whether temporary or presumably permanent. Adopting that as the established principle, how can we say that the sum awarded by the jury in this case, looking at all the surrounding circumstances, is either extravagant or unreasonable?

It is said that the Lord Chief Justice misdirected the jury, inasmuch as he failed to give due effect to evidence as to the private means of the plaintiff, independent of his professional earnings. I do not see how that can be called misdirection. That evidence was received on the first trial, and was left by my Brother Field to the jury; but he at the same time told them that they ought not to attach much importance to it. I do not think it was \*admissible at all. [285 But clearly it is no misdirection to omit to call the attention of the jury to every part of the evidence given in a cause.

The defendants moved in the Court of Appeal.

Dec. 17. *Ballantine, Serjt. (J. Brown, Q.C., and Dugdale, with him)*, for the defendants: The jury appear to have taken the amount of the plaintiff's income as the basis upon which the damages should be assessed; but the pecuniary position of the plaintiff, independently of his professional income, ought to be taken into account. The direction of Lord Coleridge comes to an unreasonable result: a surgeon with a small practice will receive a small amount of compensation, whereas a physician with a large practice will receive a large amount, though they have paid the same fare. It is submitted that the action is for breach of an implied contract to carry the plaintiff safely; and upon the principle of *Hadley v. Baxendale*<sup>(1)</sup> the defendants ought not to be held liable to compensate the plaintiff for the loss of an income, of which they had no notice at the time of entering into the contract. That case, no doubt, related to the carriage of goods, and has not as yet been extended to the carriage of passengers; but the reason probably is that there

<sup>(1)</sup> 9 Ex., 341.

1879

Phillips v. London and South Western Railway Co.

have been few, if any, cases in which damages of so large an amount as those in the present case have been awarded. The Lord Chief Justice did not call attention to the circumstance that the plaintiff was possessed of a large private income; and this was a misdirection, for the jury ought to take into account all circumstances tending to diminish the damages: *Rowley v. London and North Western Ry. Co.* <sup>(1)</sup>. The loss of the professional income was too remote and ought not to have been taken into account, *Hobbs v. London and South Western Ry. Co.* <sup>(2)</sup>; in the ordinary course of the defendants' business injury to a passenger is not accompanied by the loss of a professional income, and therefore damages for the temporary loss of profits cannot be recovered by the plaintiff: *Mayne on Damages*, c. 2, p. 19 (3d ed.). Moreover, the Lord Chief Justice did not point out to the jury, [286] that the special fees received by the \*plaintiff were a precarious source of income and ought not to be estimated in assessing the damages.

BRAMWELL, L.J.: I am of opinion that there should be no rule.

I will deal first with the last objection that has been alleged, namely, that Lord Coleridge directed the jury that they must take £5,000 as the net income, and that they must not make any deduction for special emoluments, which may be called a source of precarious income. If Lord Coleridge had so directed the jury, his summing-up would have been inaccurate, because the jury would consider that in coming to an average the special emoluments could not be treated as profits as they might not happen again. On the other hand, I am quite certain that in the computation they ought not to be wholly excluded; the right course to follow is to include the possibility and probability of their recurrence. A physician may not be able to point out any patient who is likely to present him with another sum of £500, but the probability is that in the course of his life he will receive other presents of the same, or, at least, of a large amount. The jury must take into account that these presents are precarious. Lord Coleridge did not withdraw that circumstance from the jury, but gave them what in my opinion was a most proper direction.

I will now proceed to discuss the main question which has been argued before us. In many cases where a complaint is made of the amount found by the jury, it is impossible to get at the elements upon which the computation was made: if the case before us had been of that description, I should

<sup>(1)</sup> Law Rep., 8 Ex., 221.

<sup>(2)</sup> Law Rep., 10 Q. B., 111; 11 Eng. R., 181.

say that as Lord Coleridge who tried the case, and the judges of the Common Pleas Division are satisfied with the finding at this, a second trial, it would require a very strong case to induce me to set aside a finding so given. A case is nearly always better tried upon a second than upon a first trial, the points in dispute being better understood. Even if we could not determine upon what ground the jury proceeded, I should think that there is nothing so clearly wrong in what the jury have done as to induce us to disregard the opinions of all those before whom the case has previously come. But we need not deal with this case on such considerations, for we can judge upon what ground the jury did proceed, namely, they gave £1,000 as compensation for the plaintiff's bodily suffering, and they gave him three years' loss of income at £5,000 a year. I cannot say that I think that amount too much: the only misgiving which I have is, whether the jury ought not to have given more. At any rate the amount is not excessive. It is necessary to consider what is the proper direction to be given in a case of this description. I think that the direction of Lord Coleridge was such as is usually given and was right. I have tried as judge more than a hundred actions of this kind, and the direction which I in common with other judges have been accustomed to give the jury, has been to the following effect: "You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course it is almost impossible for you to give to an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider, under all the circumstances, what is a fair amount to be awarded him." I have never known a direction in that form to be questioned. I may take the common case of a laborer receiving an injury, which has kept him out of work for perhaps six months; his evidence may be that before the time of the accident he was earning twenty-five shillings a week, that during twenty-six weeks he has been wholly incapacitated for work, that for ten weeks afterwards he has been able to earn only ten shillings a week, and that he will not get into full work again for twenty weeks. The plaintiff will be entitled to twenty-five shillings for each of the twenty-six weeks, and to fifteen shillings for each of the ten and twenty weeks. He is also entitled to some amount for his bodily sufferings and for his medical expenses; and in this manner the compensation to be awarded to him is estimated. I have put a case where a definite term may be fixed upon within which the party

1879

Phillips v. London and South Western Railway Co.

injured will recover ; but suppose a case in which no definite term can be fixed : in that case the direction to the jury is that they must consider for themselves how long the plaintiff will be incapacitated from earning his livelihood or practising his profession, but that they must take into account the chance of his losing employment if he had 288] not met with the accident. Nevertheless \*the fundamental rule is to give the plaintiff a fair and reasonable compensation for his pecuniary loss. I have always understood that this was a right direction, and I never heard it questioned until to-day. I do not see any wrong or anomaly in it. It is argued that it has an unjust operation for the following reason: two passengers are carried upon the same journey for the same fare ; if one of them is injured, he will obtain £10,000 damages against the company ; whereas if the other meets with an accident, he will obtain only £1,000. This result may be unreasonable as regards the passengers *inter se*, but it is not unreasonable between the company and the public. The company have taken their powers upon certain conditions ; and one of them is that if they break their contracts to carry safely and securely (which may happen without any moral blame attaching to them), they shall make adequate compensation to the person injured. It may be that the passenger who recovers £10,000 has paid too little for his ticket, and that the passenger who recovers £1,000 has paid too much : nevertheless together they have paid what is a compensation to the company for the risk which they undertake ; and if the Legislature should hereafter think fit to limit the liability of railway companies as to very large amounts, they ought at the same time to diminish the fare to be paid, part of which is insurance money. Therefore I do not think that an anomaly exists as between the passengers and the railway company. The defendants are liable by law to compensate the plaintiff, they had entered into a contract to carry him safely and securely ; owing to a misfortune they have broken that contract, and they must indemnify him to a fair and reasonable amount for the loss sustained by him through failure to perform their contract.

I wish to say a few words as to *Hadley v. Baxendale* ('). An entire dissimilarity exists between that case and this. In that case the cause of action was for delay in the delivery of a chattel, and the plaintiff claimed damages not for injury done to the chattel itself, but for loss consequential upon the delay, which had been proved. In the present

(') 9 Ex., 341.

case the plaintiff claims damages for injuries done to himself whilst being carried as a passenger; \*they are not to [289 be assessed upon the same footing, as if he were suing for compensation in consequence of his non-arrival at a particular place at a particular time. *Hadley v. Baxendale* (1) bears no analogy to the present case. From another point of view the carriage of goods does present a certain analogy to the present case: a parcel is delivered to a railway company to be carried from one station to another and is lost during the transit; if it contains cotton they may have to pay £5, if it contains silk they may have to pay £500, and yet the sum charged for the carriage may be the same. This would be the position of a railway apart from the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), which gives them a right to charge some additional sum by way of insurance on a declaration being made of the nature of the goods delivered to be carried. Of course there are many valuable articles which are not within the Carriers Act, and if any of these are lost upon a railway, the company are liable for the full value, although they may receive only the same sum as for carrying an article of small value over the same distance.

In conclusion I have only to observe that Lord Coleridge in the present case followed the ordinary form of summing-up, and that there is no ground for supposing that the jury have given any amount beyond what the summing-up warranted. I think, therefore, that we must refuse this rule.

BRETT, L.J.: The present case raises a question which I have often been called upon to consider in similar cases, and I have come to the conclusion that the direction of Lord Coleridge was right according to the recognized principles of law. The action is for breach of a contract to carry a passenger safely and securely, and the only damages which can be obtained are damages for the breach of that contract. The fundamental proposition no doubt is, that the plaintiff is to receive such damages as will compensate him for the injury ensuing from the breach of the contract. That injury is of a complicated nature; the plaintiff has received a bodily hurt, and also he has sustained a pecuniary loss.

As has been already stated by Lord Justice Bramwell there has been for years a recognized mode of leaving the question of \*damages to the jury, and in the present case Lord [290 Coleridge in effect told the jury that the compensation was to be such as they might think fair and reasonable, but that they must not attempt to give an absolutely perfect compensation with respect to the pecuniary loss. I apprehend that

(1) 9 Ex., 341.

both those propositions are correct, and that the reason why this general mode of leaving the question to the jury is right, is that human ingenuity has not been able to devise a more correct proposition, and that if a judge tries to make a perfect proposition, he either states something which is wrong, or omits to state something which ought to be stated. It was in effect decided in *Rowley v. London and North Western Ry. Co.* (1) that it is a misdirection to tell the jury that they ought to try to give a perfect compensation: by that I apprehend was meant a perfect arithmetical compensation, and the reason is that it is impossible to bring before a jury all the circumstances which would entitle them to come to a conclusion of that kind. In that case the Lord Chief Baron had tried to direct the jury to give a perfect compensation, by telling them to calculate an annuity which would produce for a certain number of years, or for such a number as they might think necessary, the sum which they thought the mother of the deceased had been deprived of by his death. The Court of Exchequer Chamber were of opinion that this attempt to give a nearly perfect compensation was wrong, because a jury must necessarily leave out a multitude of circumstances, which they ought to take into consideration in order to estimate a perfect compensation, but which no human ingenuity and no evidence could bring before them. We are therefore bound by a decision of the Court of Exchequer Chamber, which was of co-ordinate jurisdiction with the present Court of Appeal, to hold that the direction of Lord Coleridge was right, and I may add that apart from any decision I am of opinion that no fault can be found with it. As I have already intimated, it has long been recognized as a proper mode of summing-up to tell the jury to give such compensation as under all the circumstances they may think fair and reasonable, and at the same time in order to assist them, to point out some circumstances which they ought to consider. When the jury have 291] to give compensation \*for the loss of a professional or trading income, the chief points to be considered are the amount of that income and of what it is made up. It has been in effect suggested by the counsel for the defendants that the amount of the income at the time of the accident ought not to be taken into account. This suggestion seems to me erroneous. If Lord Coleridge had told the jury as matter of law that it must be presumed that during the time which had elapsed since his accident the plaintiff would have made £5,000 a year, I should have thought it a misdi-

(1) Law Rep., 8 Ex., 221.



rection, because if he had remained well many circumstances might have arisen to prevent him from making that income. But I apprehend that Lord Coleridge did not so direct the jury; he in effect told them that they would have to consider what income upon taking an average the plaintiff had been making, that that income appeared to be £5,000 a year, and that unless they could see circumstances which would probably have made it less, they might well assume that he would have continued to make £5,000 a year. I apprehend that this direction was correct. Bramwell, L.J., has described how the earnings of a working man ought to be dealt with. I agree with his view subject to this remark, that his description assumes that no circumstances existed, which would have prevented the working man from earning the same wages during the time when he was in fact disabled. If the plaintiff had resided in Lancashire and had earned his livelihood by working at the mills there, and if all the mills in Lancashire had been closed from the time of the accident, the jury would have to weigh that fact and consider whether he could have continued to earn his ordinary wages.

I have so far been speaking of the period between the time of the accident and the date of the trial. With regard to subsequent time, if no accident had happened, nevertheless many circumstances might have happened to prevent the plaintiff from earning his previous income; he may be disabled by illness, he is subject to the ordinary accidents and vicissitudes of life; and if all these circumstances of which no evidence can be given are looked at, it will be impossible to exactly estimate them; yet if the jury wholly pass them over they will go wrong, because these accidents and vicissitudes ought to be taken into account. It is true that the \*chances of life cannot be accurately calculated, but [292 the judge must tell the jury to consider them in order that they may give a fair and reasonable compensation. It has been objected that the direction was wrong, because Lord Coleridge told the jury that the proved income was to be taken as the basis of compensation; if he had told them that that was the only basis, the direction would have been wrong; but Lord Coleridge merely said that the income was a basis, not the basis, of compensation. It is one circumstance, and to my mind the chief circumstance, to be taken into account in estimating the pecuniary loss.

It has been urged that an anomaly exists if Lord Coleridge's view is correct. According to it a surgeon with a small practice, who paid the same fare as the plaintiff, would have received £500 for the same accident and the same per-

sonal injury, whereas the plaintiff has obtained £16,000. It seems to me that the argument is fallacious. The surgeon with the small practice and the plaintiff would not suffer the same pecuniary loss, although the personal suffering may be the same. The former may have lost only £300 by the accident, whereas the latter may have lost £1,300. No anomaly exists. In my opinion it would be right that a jury should give the same amount to a working man and to a person of great wealth for personal injury, if that is the same, and if the accompanying suffering is the same; that each should receive the expenses which he has properly incurred; but that in estimating the pecuniary loss, each should receive as nearly as possible only the amount of the loss which he has actually sustained. I think that no injustice flows from this mode of estimating the compensation. I repeat that the summing-up complained of was right, and that the ordinary mode of directing a jury in cases of compensation is correct and in future ought to be followed.

COTTON, L.J.: I agree that there should be no rule in this case, and have little to add to what has fallen from the Lords Justices.

In such cases as this, when the plaintiff has established his right to a judgment against the company, he is entitled by way of damages to fair compensation for his suffering, and also for his pecuniary loss. The misdirection complained of in the present case was with regard to the latter head of compensation. The contention of the defendants really came to this, that, in estimating a fair compensation for the pecuniary loss, the actual income of the plaintiff should not be taken into account by the jury; in truth, that is to say, that in estimating a fair compensation for the pecuniary loss that ought to be disregarded which really constitutes the pecuniary loss. I say so, because the pecuniary loss consists of the loss of income, which the plaintiff, but for the accident, would have earned, and was prevented by the accident from earning. I am now dealing with the question whether the income which the plaintiff has been earning is to be wholly disregarded. In my opinion it is impossible to do so if compensation is to be awarded, not only for the bodily suffering, but also for the pecuniary loss. As the income is not to be excluded from the consideration of the jury, the question still remains whether, at the trial of this action, it was properly taken into account. In my view a fair compensation for the pecuniary loss is not to be arrived at by any arithmetical process; it cannot be said that the amount of the income being known, the loss is reduced to a mere matter of

calculation. Lord Coleridge has not taken this course, but he has directed the jury to look to the nature of the income, the probability of its continuance, and the circumstances upon which it depended. The plaintiff is not to receive an annuity for the rest of his life calculated on the amount of his income; it was possible that he might have been disabled by illness or other causes from continuing to earn it; after taking into account the chances affecting the income, the jury were to say what, in their opinion, was a fair compensation for the disability, whether permanent or temporary, under which the plaintiff came of practising his profession and earning the income which he previously enjoyed. It may be said that this is to direct the jury to guess the amount to be awarded to the plaintiff, but it cannot be arrived at with mathematical certainty. In my opinion the jury must take into consideration as a basis, if not the basis, of their estimate, the income which the plaintiff was earning at the time of the accident, and determine whether its amount was permanent or accidental. In my opinion Lord Coleridge's direction was correct; he told the jury that they must give a fair compensation for the pecuniary \*loss. In my opin- [294  
ion, it would be wrong to exclude altogether the special fees; if a physician within a given time receives several large fees, it is certainly a matter for the consideration of the jury whether he would continue to get that income; special fees constitute an element which is not to be left out in ascertaining what is the pecuniary loss which the plaintiff has sustained by being debarred from following his profession.

I may mention one matter which has not been dealt with. It has been urged that independent income ought to be taken into account in estimating the pecuniary loss. I cannot agree to that. The fact that he has an independent income does not make the plaintiff's pecuniary loss less. As to bodily suffering, the possession of an independent income may come into consideration, because a man may suffer very much more from bodily injury when he is deprived of all means of support, and is reduced to such poverty that he cannot provide for himself what will alleviate his sufferings; he is in a different position from the man who, having an independent income, meets with a similar accident. A poor medical practitioner may probably be entitled to a larger compensation for his misfortune, because he has no private income out of which he may alleviate his sufferings. As to this, however, I do not express any definite opinion. I need only say, as to the present case, that in estimating the pecuniary loss the independent income of the plaintiff

1880

Scaramanga v. Stamp.

is not to be taken as a kind of set-off, so as to reduce the amount which the jury would otherwise award.

*Rule refused.*

Solicitor for defendants: *M. H. Hall.*

[5 Common Pleas Division, 295.]

April 20, 1880.

[IN THE COURT OF APPEAL.]

295] \*SCARAMANGA & Co. v. STAMP and Another.

*Ship—Deviation—Charterparty.*

A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.

The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the Arion, and the master, in consideration of £1,000, agreed to tow her into the Texel, which was out of his direct course. Whilst so doing the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost. The jury found that it was not reasonably necessary to take the Arion to the Texel in order to save the lives of those on board her; but it was reasonably necessary to do so in order to save her and her cargo:

*Held*, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover the value of the cargo against the defendants as owners of the ship.

APPEAL by the defendants from the judgment of Lindley, J., after trial (').

The facts of the case are stated in the judgment of Lindley, J., and also in the judgment of Cockburn, C.J., *post*, p. 298.

1879. Dec. 15. *Herschell*, Q.C., and *Benjamin*, Q.C., for the defendants: The question in this case is whether the owners of the steamship *Olympias* are liable for the loss of the cargo caused by a deviation. The alleged deviation consisted in towing a vessel in distress, named the Arion. It is unnecessary for the defendants to deny that deviation for the mere purpose of saving the cargo of another vessel in distress is unjustifiable, *Bond v. The Brig Cora* ('); and it may be admitted that those on board the Arion might have been saved simply by taking them on board the *Olympias*: nevertheless it is always reasonable to deviate in order to save those on board a vessel whose lives are in peril; and one question which ought to have been left to the jury is, whether the steps taken by the master of the *Olympias* were a reasonable mode \*of saving those on board the

(') 4 C. P. D., 316; *ante*, p. 557.

(\*) 2 Wash. C. C., 80.

Arion. It is in favor of public policy and for the benefit of maritime adventure that every inducement should be held out to save life.

[BRETT, L.J.: Can that be a reasonable mode of saving life which is not absolutely necessary for that object?

BRAMWELL, L.J.: It is always justifiable to make away with property in order to save life: *Mouse's Case*(<sup>1</sup>). There is in this respect a wide distinction between life and property.]

*Davis v. Garrett* (<sup>2</sup>) is the only reported case in the English courts in which an action has been maintained by the owner of the cargo against the owner of the ship upon the ground of deviation; it is, however, plainly distinguishable, inasmuch as the deviation complained of in it was wholly wrongful. It is not disputed on behalf of the defendants that that case establishes that a wrongful deviation makes the owner of the vessel liable, although the same accident would have happened if there had been no deviation; but the decision has no bearing on the present action. There are, however, some dicta of English judges, which are in favor of the defendants. *The Beaver* (<sup>3</sup>) was a case of salvage; but Sir W. Scott, in delivering judgment, said (p. 294): "It is the duty of every king's ship, and indeed of every other ship, to give assistance, as well against the elements as against the enemy." The property saved was a vessel which had been rescued from the enemy. Dicta of a similar nature are to be found in the following cases of *Lawrence v. Sydebotham* (<sup>4</sup>); *The Waterloo* (<sup>5</sup>); *The Jane* (<sup>6</sup>); *The Deveron* (<sup>7</sup>); *The Orbona* (<sup>8</sup>). It is true that these cases cannot be deemed binding authorities for the defendants, but they show that it has never been decided, at least in an English court, that deviation even to save property is unlawful. If one vessel sees another with signals of distress flying, it is not a deviation if she goes to assist her.

[BRETT, L.J.: In 1 Arnould on Marine Insurance, part 1, ch. 10, p. 502 (5th ed.), it is laid down that deviation in order to save life \*is justifiable, but that this liberty does [297 not extend to deviation to save property.]

It may be that deviation merely to save the property of others is unlawful, 1 Phillips on Marine Insurance, ch. 12, s. 11, pars. 1027, 1028, pp. 589, 590 (5th ed.); and if the crew

(<sup>1</sup>) 12 Rep., 63.

(<sup>2</sup>) 6 Bing., 716.

(<sup>3</sup>) 3 C. Rob., 292.

(<sup>4</sup>) 6 East, 45, at p. 52, per Lord Ellenborough, C.J., and per Lawrence, J., at p. 54.

(<sup>5</sup>) 2 Dodson, 438, at p. 437.

(<sup>6</sup>) 2 Hagg. Adm., 338, at p. 345.

(<sup>7</sup>) 1 Wm. Rob., 180, at p. 182.

(<sup>8</sup>) 1 Spinks, 161, at p. 166.

of the *Arion* had been taken off, the *Olympias* could not have lawfully towed her: but whilst they remained on board, any reasonable measures might be adopted to save both them and the vessel. As the loss of the cargo happened through the perils of the sea, the burden of proof is upon the plaintiffs to establish that the defendants are liable for it. If the contention for the plaintiffs is right, it will follow that if the crew of a vessel in distress are taken off, the rescuing vessel must carry them to the end of her voyage, however distant her port of destination may be.

*C. P. Butt*, Q.C., for the plaintiffs: No doubt some authority may be found which appears to favor the proposition, that a vessel may deviate from her course in order to save life; but it is unnecessary for the plaintiffs to admit it to be true. In some of the cases to which reference has been made on behalf of the defendants, such as *The Orbona* (\*), there appears to have been danger to life as well as to property. The effect of a deviation to save life and property has not been ascertained by decision in an English court, *Papayanni v. Hocquard* (\*); *Carmichael v. Brodie* (\*); and the question is treated doubtfully in 3 Kent's Com., part 5, lec. 48, pp. 312, 313. On the other hand, it is said in 2 Parsons on Marine Insurance, ch. 1, s. 5, p. 35, that "a delay for the purpose of towing a vessel is certainly a deviation, unless there are persons on board the vessel towed who can be saved in no other way." This is a proposition which is directly in point for the plaintiffs, and which, it is submitted, ought to be adopted.

Dec. 16. *Herschell*, Q.C., in reply: By implication of law a ship may go out of her course in order to avoid capture, and this shows that in some cases deviation may be justified. If a ship may deviate in order to save life, surely she may do so in order to save property: the violation of 298] the contract between the owner of \*the ship and the owner of the goods is not greater in the latter case than in the former.

[BRETT, L.J.: It is contrary to public policy that a ship should not deviate in order to save life: for a vessel to go out of her course with that object is not a violation of the contract, that she shall proceed direct to the port for which she is bound.]

When life is in peril, every effort ought to be made to pre-

(\*) 1 Spinks, 161.

(\*) Law Rep., 1 P. C., 250, at p. 254.

(\*) Law Rep., 1 P. C., 454, at p. 461.

serve it; and the means taken to insure that object ought not to be criticised too nicely.

*Cur. adv. vult.*

1880. April 20. The following judgments were delivered :

COCKBURN, C.J.: This case comes before us on appeal from a judgment of Mr. Justice Lindley after a trial at *nisi prius*. The facts are not in dispute, and lie in a very narrow compass. The steamship *Olympias*, of which the defendants are owners, having been chartered by the plaintiff to carry a cargo of wheat from Cronstadt to Gibraltar, and having started on her voyage, when nine days out, sighted another steamship, the *Arion*, in distress, and, on nearing her, found that the machinery of the *Arion* had broken down, and that the vessel was in a helpless condition. The weather was fine and the sea smooth, and there would have been no difficulty in taking off and so saving the crew; but the master of the *Arion*, being desirous of saving his ship, as well as the lives of his crew, agreed to pay £1,000 to the master of the *Olympias* to tow the ship into the Texel.

Having taken the *Arion* in tow, the *Olympias*, when off the Dutch coast, on the way to the Texel, got ashore on the Terschelling Sands, and with her cargo was ultimately lost.

Under these circumstances the plaintiff claims the value of his goods, alleging that the goods were not lost by perils of the seas, so as to be within the exception in the charter-party, but were lost through the wrongful deviation of the defendants' vessel. The defendants plead that the deviation was justified, because it was for the purpose of saving the *Arion* and her cargo, and the lives of her captain and crew, the ship being in such a damaged condition that she could not be navigated.

That there was here a twofold deviation, which, unless the \*circumstances were such as to justify it, would en- [299 title the plaintiff to recover, cannot be disputed—in the first place, in the departure of the *Olympias* from her proper course in going to the Texel, secondly, in her taking the *Arion* in tow, which, in the three American cases of *Hermann v. Western Marine and Fire Insurance Company* (\*), *Natches Insurance Company v. Stanton* (\*), and *Stewart v. Tennessee Marine and Fire Insurance Company* (\*), has been held to be equivalent to a deviation, and rightly so, seeing that the effect of taking another vessel in tow is necessarily to retard the progress of the towing vessel, and thereby to prolong the risk of the voyage. It is unneces-

(\*) 13 Lo. R., 516.

(\*) 2 Smed. & M., 340.

(\*) 1 Humph., 242.

1880

Scaramanga v. Stamp.

sary to consider how far, if the loss had not been the consequence of the deviation, the mere fact of the deviation would render the shipowner liable to the goods owner for loss that ensued after it, as distinguished from its effect in a case of insurance; as there can be here no doubt that the loss not only occurred during the deviation, but was occasioned by it, there being the express admission of the master to that effect; and the case therefore comes within the ruling in *Davis v. Garrett* (<sup>1</sup>), the authority of which, so far as relates to a loss of goods occurring during the course of a deviation, has never been questioned.

It becomes therefore necessary to consider how far the grounds on which the defendants seek to justify the deviation, can avail them in defence of the action. As regards that part of the plea which seeks to justify the deviation on the ground of its having been for the purpose of saving the lives of the crew of the *Arion*, it is obvious that the defence fails on the finding of the jury, who have found, and beyond question rightly, that the deviation was not reasonably necessary in order to save the lives of those on board. On the other hand, the jury have found that the deviation was reasonably necessary for the purpose of saving the *Arion* and her cargo. The question for decision, therefore, is whether, when deviation has taken place with the object, not of saving life, but of saving property alone, the shipowner will be exempt from liability to a goods owner whose goods have been lost through the deviation. Mr. Justice Lindley, before whom 300] the cause was heard at *nisi prius*, gave judgment in favor of the goods owner, the plaintiff, and the case comes before us on appeal from his decision. I am of opinion that his decision was right and ought not to be disturbed.

It is a remarkable fact that, while the commerce and the mercantile marine of Great Britain have been for so many years the largest in the world, the question as to how far a deviation for the purpose of saving life or property is justifiable as against a goods owner or insurer, has never come before the tribunals of this country, so as to be authoritatively determined; while in the United States both questions have on several occasions come before the courts, and the law may now be taken to be there settled by judicial decision, as well as by the consensus of jurists. In this country the question, with one exception, has only presented itself incidentally to that of salvage, and cannot be said even in that form to have been brought to the test of judicial decision. The exception in question is to be found in the case

(<sup>1</sup>) 6 Bing., 716.



of *Lawrence v. Sydebotham* (<sup>1</sup>), in which the question of deviation to assist a vessel in distress was incidentally touched upon, but was not the point for decision. In that case Lawrence, J., says: "As to deviations for the purpose of succoring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress. But that," he continues, "was not the case here; the prize was in no distress." This observation, made to meet the argument of counsel, was altogether *obiter dictum*, the question in the cause having no reference to deviation at all, but being whether under a policy authorizing the taking of prizes in the course of a voyage, the shortening sale in order to remain by and protect a captured prize, was within the terms of the policy. The learned judge, it is to be observed, in no way explains what he means by the term "deviation," or the degree of assistance which is to be understood as to be given for what he terms "the common advantage." That the question of deviation was not before the court, is apparent from the language of Lord Ellenborough, who, after stating what the point really was, says (<sup>2</sup>): "This does not affect the question how far slackening sail from \*motives of [30] humanity to succor another ship in distress is allowable; nor is it necessary to touch upon it. Perhaps, when such a case does arise, it may be found for the general benefit of all insurers (and amongst others consequently for the benefit of those who may raise such an objection) to allow such succor to be given without imputing deviation to the succoring ship. It is not however necessary now to give any opinion on that point."

The other cases in which the question has incidentally arisen are all cases of salvage. In the case of *The Beaver* (<sup>3</sup>), there were conflicting claims, it being insisted on behalf of a king's ship that the ship saved had been a derelict, and had been saved entirely through the assistance of the king's ship. All that Sir William Scott says is, "With respect to the king's ship, I cannot admit the inflated representation which has been made of their services. It is the duty of every king's ship, and indeed of every other ship, to give assistance, as well against the elements as against the enemy." How far that duty extended, or how far it would protect a shipowner from the consequences of a deviation, the learned judge does not say, nor does it appear to have been present to his mind.

(<sup>1</sup>) 6 East, 45, at p. 54,(<sup>2</sup>) 6 East, at p. 32.(<sup>3</sup>) 3 Chr. Rob., 292.

In the later case of *The Waterloo* (<sup>1</sup>), in which salvage was claimed by the owners and crew of a ship chartered by the East India Company, for salvage services rendered to one of the company's own ships, and in which the claim was resisted on the ground that, by the terms of the charter-party and the instructions under which the ship sailed, no salvage could be demanded, Sir William Scott it is true says: "As to the instructions, they extend no further than to enjoin the duty of assisting other ships belonging to the company; but they do not express that this duty, which it is very proper to enjoin, shall receive no remuneration, whatever be the active merit, whatever be the suffering incurred in performing it. It is the duty of all ships to give succor to others in distress; none but a freebooter would withhold it; but that does not discharge from liability to payment where assistance is substantially given." Here again the learned judge is dealing with the subject of duty only so far as it affected the claim to salvage; with its effect in respect 302] of deviation \*he had nothing to do. Yet it appears to have occurred to him that the deviation might not be without serious consequences in respect of the ship's insurance; for in fixing the amount to be paid for salvage, after dwelling on the merits of the claim, he adds, "Nor can I altogether lose sight of the dangers the ship thus incurred of vitiating her insurance, though that may be a questionable point."

In the case of *The Jane* (<sup>2</sup>), where the master of a whaler had gone with a boat's crew at the risk of their lives to the assistance of a vessel dismasted, and with the sea making a breach over her, and the crew of which had taken to the rigging as their last resource, it being urged on behalf of the owners that they had incurred the risk of forfeiting their insurance, the court (Sir Charles Robinson) is said to have "entertained some doubt as to the positive forfeiture of the insurance in all cases by deviation to assist vessels in distress"—evidently looking upon the question as an unsettled and uncertain one.

In the later case of *The Orbona* (<sup>3</sup>), Dr. Lushington appears, indeed, to have taken a more decided view. Referring to the claim for additional salvage, on the ground of the fatal effect which the deviation might have had on the insurance, he says: "It is said that the insurance of the Poitiers was void. That is not true in law; for it is not the law that if one vessel goes out of her way to assist another in distress, the insurance is void." In support of which he refers to

(<sup>1</sup>) 2 Dods., 433.

(<sup>2</sup>) 2 Hagg., 338.

(<sup>3</sup>) 1 Spinks, 161.

what was said by the judges in *Lawrence v. Sydebotham* <sup>(1)</sup>, but which, as I have already shown, affords no sufficient authority for the position in question.

In two more recent cases the Judicial Committee of the Privy Council appear, however, to have taken a more doubtful view of the subject than seems to have been entertained by Dr. Lushington in the case just referred to. In delivering the judgment of the Judicial Committee in *Papayanni v. Hocquard* <sup>(2)</sup>, the risk run of vitiating the insurance having been urged as a reason for increasing the amount to be allowed for salvage, Dr. Lushington says: "With reference to the uncertainty in which the subject is involved, their Lordships have been invited to solve the \*question. Their Lordships beg to decline that invi- [303 tation. We are of opinion," he continues, "that this question ought to be raised, not incidentally before this, but directly before another tribunal, as the great question at issue, and there receive the most careful deliberation, until at last it comes to a final solution and is set at rest." He adds, however, that in considering the amount of salvage to be given, "The judge can never forget that there was possibly a risk incurred in respect of the vacating of policies, and in regard to actions which might be brought by owners of cargo."

In like manner, in the subsequent case of *Carmichael v. Brodie* <sup>(3)</sup>, the Judicial Committee held that the claim of the owners of the ship should be considered with reference to "the doubt whether the insurance might not be vitiated, and whether the owners of the ship might not become responsible to the owners of the cargo for the acts of their servants in deviating from their course to render the assistance, and weakening the crew"—thus treating the question of law, as to the effect of a deviation for the purpose of rendering assistance, as unsettled and uncertain.

The case before us presents itself, therefore, so far as our courts are concerned, as one of the first impression, on which we have to declare, or perhaps, I may say, practically, to make, the law.

I am glad to think that in doing so we have the advantage of the assistance afforded to us by the decisions of the American courts and the opinions of American jurists, whom accident has caused to anticipate us on this question. And, although the decisions of the American courts are of course not binding on us, yet the sound and enlightened views of

<sup>(1)</sup> 6 East, 54.

<sup>(2)</sup> Law Rep., 1 P. C., 250.

<sup>(3)</sup> Law Rep., 1 P. C., 461.

1880

Scaramanga v. Stamp.

American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part.

It is, however, unnecessary to go through the American decisions in any detail. The effect of them is to be found in the well known text writers, but is nowhere better stated than in the judgment of Mr. Justice Sprague in the case of 304] *Crocker v. Jackson* (<sup>1</sup>). The \*result of these authorities, immediately bearing on the question which we have here to decide, may be briefly stated.

Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of “perils of the seas.” And, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation.

If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorized deviation.

But where the preservation of life can only be effected through the concurrent saving of property, and the *bona fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating.

In these propositions I entirely concur, as well as in the reasoning by which this view of the law is supported by Mr. Justice Lindley in his very able judgment. The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences, which may result to a ship or cargo from the rendering of the needed aid. It would be

(<sup>1</sup>) Sprague's R., 141.

against the common good, and shocking to the sentiments of mankind, that the shipowner should be deterred from endeavoring to save life by the fear, lest any disaster to ship or cargo, consequent on so doing, should fall on himself. Yet it would be unjust to expect that he should be called upon to satisfy the call of humanity at his own entire risk. \*Moreover, the uniform practice of the mariners of [305 every nation—except such as are in the habit of making the unfortunate their prey—of succoring others who are in danger, is so universal and well known, that there is neither injustice nor hardship in treating both the merchant and the insurer as making their contracts with the shipowner as subject to this exception to the general rule of not deviating from the appointed course. Goods owners and insurers must be taken, at all events in the absence of any stipulation to the contrary, as acquiescing in the universal practice of the maritime world, prompted as it is by the inherent instinct of human nature, and founded on the common interest of all who are exposed to the perils of the seas. What would be the effect of such a stipulation as I have just referred to, if it existed, it is unnecessary for the purpose of the present case to consider.

Deviation for the purpose of saving property stands obviously on a totally different footing. There is here no moral duty to fulfil, which, though its fulfilment may have been attended with danger to life or property, remains unrewarded. There would be much force, no doubt, in the argument that it is to the common interest of merchants and insurers, as well as of shipowners, that ships and cargoes, when in danger of perishing, should be saved, and consequently that, as matter of policy, the same latitude should be allowed in respect of the saving of property as in respect of the saving of life, were it not that the law has provided another, and a very adequate motive for the saving of property, by securing to the salvor a liberal proportion of the property saved—a proportion in which not only the value of the property saved, but also the danger run by the salvor to life or property is taken into account, and in calculating which, if it be once settled that the insurance will not be protected, nor the shipowner freed from liability in respect of loss of cargo, the risk thus run will, no doubt, be included as an element. It would obviously be most unjust if the shipowner could thus take the chance of highly remunerative gain at the risk and possible loss of the merchant or the insurer, neither of whom derive any benefit from the preservation of the property saved. This is strikingly exempli-

fied in the present case, in which, not content with what would have been awarded to him by the proper court on account of salvage, the master \*made his own terms, and would have been paid a very large sum had the attempt to bring the Arion into port proved successful. It is obviously one thing to accord a privilege to one who acts from a sense of duty, without expectation of reward, another to extend it to one who neither acts from a sense of moral duty nor in obedience to what may be thought to be the policy of the law, but solely with a view to his own individual profit.

In the result, I am of opinion that though the deviation of the Olympias, so far as relates to her proceeding to the Arion in the first instance, was justified, the taking the latter in tow, and departing from the proper course in order to take the ship to the Texel, this not being necessary in order to save the lives of the captain and crew, was an unauthorized deviation; and the loss of the plaintiff's cargo having been the direct consequence of the deviation, or, to use the language of Tindal, C.J., in *Davis v. Garrett* (<sup>1</sup>), "the loss having actually happened whilst the wrongful act was in operation and force, and being attributable to the wrongful act," the defendants cannot avail themselves of the exception in the charterparty, and the plaintiff is, therefore, entitled to judgment. The appeal must, therefore, be disallowed.

I am authorized by my colleagues, Lord Justice Brett and Lord Justice Cotton, to say that they concur in the judgment I have just delivered.

BRAMWELL, L.J.: I am of opinion that this judgment must be affirmed. The defendants have undertaken to the plaintiff to carry his goods from port to port without deviation, unless for cause justifying such deviation. The defendants have deviated, and so broken their contract unless they can show such cause. Now the cause that will justify non-compliance with an undertaking may be express or implied in the contract itself, or added to it by usage or by some positive law. The cause alleged in this case is, that the deviation was a reasonable one to save a ship and her cargo from loss and destruction. It is certain that no law orders such a deviation. It is certain there is no usage, which adds to the contract a power to deviate for such cause. On the contrary, every opinion is against it, and it 307] is certain that ships which \*desire to have a power, or one somewhat like it, expressly stipulate for it, as for

(<sup>1</sup>) 6 Bing., 716, at p. 724.

example, for the right to tow vessels. As it is not expressed in the contract between the plaintiff and the defendants, the only remaining question is, can it be implied? Now, for my own part, I think it most objectionable to add to the contracts of parties that, which they could have added themselves had they been minded. It is to suppose they would have made the contract we make for them, had they only thought of it: a supposition very likely to be wrong. Still in some cases it is and must be done. It is said it must be in this case on the ground of public policy. That is to say, as I understand, that it is for the good of mankind in general, and so of Englishmen, that ships should, without liability to freighters, have power to deviate to save other ships and cargoes. Now I am by no means sure that that is so. I am by no means certain that more might not be lost than gained by such a power and its exercise. I am certain of this, that the best way to manage the matter is to leave parties to make their own bargains about it. Let the ship-owner charge less freight where he reserves to himself the power, and more where he does not. I am also certain of this that even if the good of mankind and of this country in particular would be augmented by such a power, and by implying it in a contract, unless expressly excluded, we cannot imply it on the ground of public policy.

If public policy required such power should exist, a charterparty which expressly denied such power would be illegal and all its provisions void. Can that be maintained for a minute? Public policy requires the enforcement of certain rules, as that contracts shall not be illegal nor immoral, that they shall not be in restraint of trade, nor of personal freedom, that they shall not invite to the commission of crime, as an undertaking with a man to pay money to his executors if he commits suicide. But public policy would no more imply such a matter as this, and make its exclusion from a charter illegal, than it would make an agricultural lease unlawful, because some of the covenants were inconsistent with the most profitable use of the land.

I am of opinion, then, that the defendants have broken their contract without any sufficient excuse or justification, and that this action is maintainable.

\*It will be said that this is a very narrow ground [308 on which to decide the case. It may be. But it is the only ground, and it is not my fault that that is narrow. After all the question is, had the defendants sufficient justification for breaking their promise? I say no, and that the plaintiff must recover.

1880

Chapman v. Knight.

The question whether a deviation to save life is justifiable is untouched by this opinion. That question depends on different considerations and different authorities.

*Judgment affirmed.*

Solicitors for plaintiffs: *Waltons, Bubb & Walton.*

Solicitors for defendants: *Crump & Son.*

[5 Common Pleas Division, 308.]

April 8, 1880.

### CHAPMAN V. KNIGHT.

*Bill of Sale—By Equitable Owner—Prior Unregistered Bill of Sale—Grantor out of Possession—41 & 42 Vict. c. 31, s. 4—Practice—Appeal from County Court—Grounds of Judgment.*

Goods were vested in a trustee with power to sell them upon the direction of his *cestui que trust*. The *cestui que trust*, with the authority of the trustee, executed and registered a bill of sale assigning the goods :

*Held*, that the bill of sale was void as against execution creditors.

A judgment of the county court may, upon appeal, be upheld on other grounds than those on which the county court judge proceeded, if they appear and are admitted in his notes.

A county court judge decided that a registered bill of sale, given by a person out of possession of the goods assigned and deriving title from a grantee under an unregistered bill of sale, was invalid against an execution creditor.

*Held* by Grove, J. (Lopes, J., dissenting), that this decision was correct.

### APPEAL from the Clerkenwell County Court.

At the trial of an interpleader issue raising the question whether the plaintiff as execution creditor, or the claimant as holder of a bill of sale, was entitled to goods seized under a *fi. fa.* issued on a judgment recovered by the plaintiff against the defendant, the following facts appeared : On the 27th of June, 1879, the goods then being in a house occupied by the defendant Edward Henry Knight were in possession of the sheriff, who had seized them under a *fi. fa.* issued on a judgment recovered by one Bamberger against the defendant. The sheriff sold and formally delivered the goods to Oliver, a brother-in-law of Knight, and gave to 309] Oliver an \*inventory of the goods. At the foot of the inventory was a receipt signed by the sheriff's officer for £84 19s. 1d. paid to him by Oliver for the goods. The inventory and receipt were not registered as a bill of sale under 41 & 42 Vict. c. 31 (The Bills of Sale Act, 1878). On the 1st of July, 1879, Oliver by deed, in consideration of natural love and affection for his sister, Emily, the wife of Knight, assigned to Higgs the goods, an inventory whereof was annexed to the deed, in trust to permit the whole or any part



of the goods to be used and enjoyed by Emily Knight during her life for her separate use independently of her husband, or upon the direction in writing of the said Emily Knight to sell the same or any part thereof in such manner as she should in writing direct. And if any part of the same premises should at the death of Emily Knight remain unsold, in trust to permit the same to be used and enjoyed by the said Edward Henry Knight, if he should be then living. And after the death of the survivor of them, the said Emily and Edward Henry Knight, in trust forthwith to sell the same in such manner as the trustees or trustee should think fit, and to hold the moneys produced by the said sale in trust for the executors or administrators of the said Emily Knight as part of her separate personal estate. This deed also was unregistered. On the 15th of August one Chapman recovered judgment against Edward Henry Knight for a sum due on a bill of exchange. On the 15th of September, 1879, Mrs. Knight wrote to her trustee Higgs, "Will you please give me an authority to dispose of the whole or any portion of the furniture settled upon me by Mr. Oliver." On the 16th of September, 1879, Higgs wrote to her, "I hereby authorize you to sell the whole or any portion of the furniture now in your possession, and which was included in the deed of settlement dated the first day of July last." On the said 16th of September, 1879, Mrs. Knight sold the goods to one Watson for £70, giving him an inventory and receipt signed by herself and attested by a solicitor. A copy of this inventory and receipt, together with an affidavit of the execution thereof, and of the description of Mrs. Knight and the attesting witness, was duly filed under the Bills of Sale Act, 1878. At the same time an agreement whereby Watson let the goods on hire at so much a month for eighteen months to Edward Henry \*Knight, with a provision that if [310 the monthly sums were paid the effects should become the absolute property of Edward Henry and Emily Knight, was also filed, accompanied by a similar affidavit under the act.

On the 16th of September, 1879, the goods, which had remained in the possession of Edward Henry Knight, were seized in execution under the judgment recovered by the plaintiff Chapman against Knight, and were claimed by Watson, whereupon interpleader proceedings were taken, £46 12s. 10d. the debt and costs were paid into court by the claimant, and this issue was ordered.

Evidence of the identity of the goods was given, and the judge held that the identification was proved.

1880

Chapman v. Knight.

It was contended for the claimant that the settlement of the 1st of July, 1879, ought to have been registered, but the judge held that as it was not a claim by a creditor of Oliver (the original purchaser and settlor), registration of the settlement was unnecessary. It was also contended for the claimant that assuming the transaction of the 27th of June was within the Bills of Sale Act, 1878, the inventory and receipt of that date did not require to be registered in such a case as the present of a claim between Watson claimant and Chapman execution creditor, and were not the documents on which Watson relied for his title; that under the circumstances the transaction between Oliver and the sheriff did not amount to a bill of sale, on the ground that Oliver was put into possession by the sheriff; and the claimant relied on s. 20 of the Bills of Sale Act, 1878, inasmuch as his title was derived under documents of the 16th of September, which had been duly registered.

It was contended for the plaintiff that the documents of the 27th of June ought to have been registered as they were the foundation of Watson's title: *Ex parte Odell. In re Walden* (\*). The county court judge found as facts that the goods in question were, on the 27th of June, in the house No. 3 Charteris Road, which was then occupied by Knight, the execution debtor; that such goods were then in the formal possession of the sheriff under a *fi. fa.* in an action of one Bamberger against Knight, that such goods were sold and the inventory and receipt of the 27th of June [311] given to Oliver in the execution of that process, and that possession was never given to Oliver; and the judge held that the inventory and receipt was a bill of sale within the Bills of Sale Act, 1878, and ought to have been registered as provided by that act, and not having been registered was void, and he further found that, at the time of the levy at the suit of Chapman the goods were still on the premises No. 3 Charteris Road, and were in the apparent possession of Knight, the execution debtor, and his honor held that Watson could stand in no better position than Oliver, and barred Watson's claim, and gave judgment for Chapman with costs to be taxed and paid by Watson, the claimant.

A rule *nisi* having been obtained to set aside this judgment and to enter judgment for the claimant,

Dec. 12, 1879. *R. V. Williams*, for the plaintiff, showed cause: First. As the debtor remained in possession of the

(\*) 10 Ch. D., 76; 26 Eng. R., 523.

goods, a duly registered bill of sale was necessary to defeat the right of the execution creditor. Oliver must found his title on the inventory and receipt given by the sheriff. But those documents are included in the definition of "bill of sale," 41 & 42 Vict. c. 31, s. 4, and should have been registered under the act. They were not registered, and therefore Oliver had no valid title to confer on Higgs by the settlement.

Secondly. Assuming Oliver's title, and consequently his assignment to Higgs, the trustee, to have been valid, the sale to Watson, although by inventory and receipt duly registered, was invalid. Higgs, who had the legal interest under the settlement, might have conveyed that interest to the purchaser. But instead of the trustee selling by authority of the *cestui que trust*, she sold by his authority.

*Prosser*, for the claimant, in support of the rule: First. Oliver's title was good. He bought of the sheriff, who was in possession. But even if the inventory and receipt given by the sheriff needed registration under the Bills of Sale Act, 1878, in order to be valid as against an execution creditor, the transfer of property by them to Oliver was complete, and no seizure by execution creditors took place before he assigned his property to Higgs.

\*Secondly. The duly registered assignment by the [312 wife was good. She was the beneficial owner of the property. The trustee's power of sale was delegated to her.

This question was, by direction of the court, re-argued.

Dec. 19. *Prosser*, for the claimant: The point that the inventory and receipt given on the sale to the claimant should have been signed by the owner in possession of the goods, and not by the wife, who had a mere beneficial interest in them, was not decided in the county court, and is not stated as a ground of the judgment. The judge was not asked to take a note of it, nor does it appear on his notes, and therefore the plaintiff cannot raise it now: *Rhodes v. Liverpool Commercial Investment Co.* (1).

*R. V. Williams*, for the execution creditor: The judgment may be supported on any sufficient ground appearing and admitted on the notes. Suppose an action for the price of goods ordered for a company by an agent, whom the county court judge erroneously held not to have implied authority to order them, and judgment was accordingly given for the company, and it appeared on the notes that the order had been given by another agent with due author-

(1) 4 C. P. D., 425.

1880

Chapman v. Knight.

ity, the court on appeal could enter judgment for the plaintiff. Here, indeed, the judgment was rightly entered and should stand. The rule is only to enter judgment for the claimant. That cannot be done. It should have been for a new trial. In *Cousins v. Lombard Bank* <sup>(1)</sup> the court assumed throughout that if it appeared on the notes that facts had been gone into raising a point of law, a new trial might be granted in favor of the defendant.

[LOPES, J.: But ought not the point relied on to be presented to the county court judge? Suppose the appeal were by special case, could you argue questions not stated in it, and if not, can you raise new points on argument of a rule under 38 & 39 Vict. c. 50, s. 6?]

Yes, on facts appearing in the notes.

[LOPES, J.: In *Eastland v. Burchell* <sup>(2)</sup> the court availed themselves of the Judicature Act, 1875, Order XL, Rule 10, 313] in \*directing a judgment in the county court to be set aside and entered for the defendant.]

Under 13 & 14 Vict. c. 61, ss. 14, 15, the Court of Appeal from the county court is not confined to the precise questions submitted to them, but may decide upon the whole case as stated.

The evidence here is of possession by the execution debtor, a settlement of the goods by Oliver, having no title, on a trustee for the wife, and a registered inventory and receipt only signed by her. But the power was in the trustee to sell, and not in her.

*Cur. adv. vult.*

April 8. GROVE, J., after stating the facts, said: The county court judge held, that although the last bill of sale was registered, yet, as it was given by a person who had taken title from an unregistered bill of sale, it could not confer a better title than that derived from the unregistered bill of sale of the 27th of June, 1879, or the subsequent settlement of July, 1879, so that the last bill of sale was invalid as against the execution creditor. During the argument before us a point arose, on which the county court judge did not give an opinion, whether, even assuming that he was wrong on the question on which he decided the case, the registered bill of sale, not having been executed by the legal owner of the goods, was valid as against the execution creditor. A further question was also argued, whether, when a county court judge is asked to take a note at the trial, and does so, this court of appeal is limited to the point in the

<sup>(1)</sup> 1 Ex. D., 404.

<sup>(2)</sup> 3 Q. B. D., 432; 28 Eng. Rep., 362.

note, or can, if they see that the conclusion below was absolutely right on another point, give judgment upholding the judgment which is right? It was admitted that the court can grant a new trial, but denied that they can enter judgment on a new point not dealt with in the county court.

I am of opinion that the county court judge was right on the point he decided. I had a doubt, which is weakened, but not altogether removed; and I believe my Brother Lopes doubts likewise. But on the second point we are both agreed that even if the county court judge were wrong on the first point, the bill of sale signed Emily Knight was not in proper compliance with the Bills of Sale Act, and although registered, was invalid, and that, \*therefore, the [314 judgment against the claimant was right, and we have the power of upholding it. Where magistrates have given a reason for their decision which is unimportant, and their judgment has been right on other points, the superior courts have upheld their decision, on the ground that it would be absurd to send the case back to the justices when they had all the materials before them for a right decision, although the reasons given were wrong. I see no cause why that should not be done in the present case, and find nothing in the County Courts Act to prevent it. By s. 6 the person intending to appeal must request the county court judge to take a note of any point of law, and the judge is bound to take a note of the point and of the evidence relating thereto. There is nothing there which says that, if the judge shall be right in his conclusion, the court are to reverse his judgment, and decide the case wrongly because on the point submitted to us he happens to have made a mistake. It would be extravagant to suppose that we ought to do so. The parties might be agreed on the facts, and the judge may have given half-a-dozen right reasons, and yet, because he may also give one wrong one, the decision would have to be reversed. I think that would be idle.

I next turn to the two points in the case. The first is this: The execution debtor was in possession of the goods assigned by an unregistered bill of sale which is admitted to be void as against the execution creditor. There is a subsequent settlement by the grantee, that is admitted to be void, because unregistered. Then there being a third document, which I will for the present suppose to have been executed by the trustee Higgs, it is said that as this was registered it takes effect so as to vest the goods in Watson, and therefore the execution creditor is defeated. That would, I think, be altogether contrary to the intention of the Bills of Sale Act.

1880

Chapman v. Knight.

It is not specifically provided in the act that the registration shall be the registration of a document proceeding from the person in possession, or apparent possession, of the goods. But on the other hand there is nothing against this in the act. Every section seems to contemplate that a bill of sale, to be good against an execution creditor, must be a document executed by a person who has not parted with the goods, but remains in possession. The object of the act ap-315] pears to be to prevent a transaction which \*is so often fraudulent, viz., goods being conveyed to one person as security while they remain in possession of another who obtains credit on them, or misleads execution creditors into levying, and gets the costs of the proceedings taken against goods the property in which is transferred. Where there is a transfer of possession the Bills of Sale Act is not required at all. Section 8 virtually enacts that every bill of sale as against trustees in bankruptcy, sheriff's officers, and others, seizing in execution any chattels comprised in the bill of sale, and "also as against every person on whose behalf such process shall have been issued shall be deemed fraudulent and void." To what extent? Not absolutely, but "so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time" of executing such process (as the case may be), and after the expiration of the seven days for registration, "are in the possession, or apparent possession, of the person making such bill of sale." The main, and indeed almost the whole object is that it shall be known to debtors and others of the public who purchase chattels, that although they are in the apparent possession of A., yet, that by going to the proper office, one can find out that the real owner is B. Other sections show the same thing: for example, s. 20, which enacts that "chattels comprised in a bill of sale, which has been and continues to be duly registered under this act, shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale" within the meaning of the act. So likewise the final clause, s. 10, subs. 3, enacting that "a transfer or assignment of a registered bill of sale need not be registered." And again, the provisions of s. 10 require, with great accuracy, the name and description of the residence and occupation of the grantor to be stated, and the courts have been extremely stringent in enforcing compliance with all those requirements. Why? That there may be no fraud, and that it shall be accurately pointed out on the register, not merely who has got the goods, but that the grantee is not in possession. I find nothing in the act

leading to such a consequence as the argument for the claimant involves. I should hesitate before admitting such consequence, and would rather leave it to the Court of Appeal to consider. A case has been cited which \*seemed in [316 favor of the appellant, but there is in it a very material difference—perhaps not conclusive—in favor of the view I take. In *Edwards v. English* <sup>(1)</sup> not only was the claimant taking advantage of his own wrong, but there was this distinction, viz., that the second bill of sale was not a bill of sale by the transferee of the property, but by the person actually in possession. Notwithstanding the fact that the person had got rid of the property in the goods, it was held that the same person could give a sufficient bill of sale effective to confer a good title as against the execution creditor. That is in favor of my view that the main object of the Bills of Sale Act is that the person who remains in possession of the goods shall be the party whose name is on the register, and in *Edwards v. English* <sup>(1)</sup> it was held that although he had parted with the property in the goods, he could give another effective security against execution creditors. But there is another case, *Richards v. James* <sup>(2)</sup>, which goes a little further. There two bills of sale, the first unregistered, the second registered, were both granted by the same party, and the court held that the person taking under the second bill of sale took as against the execution creditors.

Now in this case if the claimant is right, although Oliver could not set up the unregistered bill of sale, he could do it practically in a moment by nominally assigning to somebody else, and then that person registering the bill of sale, so the very object not only of the statute but the *ratio decidendi* of that case would be defeated. Lush, J., delivering the considered judgment of the court says, "What then is the consequence of avoiding a bill of sale by an execution? Is it to displace the security altogether, or is it only to neutralize it so far as it affects the interest of the execution creditors, and to leave it operative as to all other interests? We are of opinion that the consequence is to displace it altogether, and that in no other way can due effect be given to the statute" <sup>(3)</sup>.

That seems to me an authority tending to support the conclusion of the learned county court judge, which I think is right. On the second point my Brother Lopes concurs with me, and we \*both think that there was not a proper [317 assignment within the Bills of Sale Act. I have already

<sup>(1)</sup> 7 E. & B., 564.

<sup>(2)</sup> Law Rep., 2 Q. B., 285.

<sup>(3)</sup> Law Rep., 2 Q. B., 285, at p. 291.

1880

Chapman v. Knight.

read some of the provisions which apply to the first point and also to the second, particularly the provisions of s. 10, as to execution and attestation, and the names of the grantor and grantee, and the index of them to be kept under s. 12.

If the second assignment by the *cestui que trust* were good the whole of that part of the act would be defeated, for a person would only have to create a secret trust and the *cestui que trust* without any legal title executing the bill of sale his name would appear as grantor and there would be no trace of the existence of the legal owner, and so fraud might be committed. Now the settlement gave no power to the wife to sell, but to Higgs to sell at her direction. She herself sells without any power given by deed or legal interest in the goods, and her name only appears on the register. It may be that she has a good equitable interest and that the courts of equity would compel Higgs to follow her direction, but that is not the question. The question is, whose name should appear in the register of the bill of sale? I think the name of Higgs and not that of Emily Knight. So the Bills of Sale Act has not been complied with and the bill of sale not properly registered, therefore even supposing the county court judge were wrong, we are of opinion that there was no proper registration here and therefore it is void, a result which cannot be altered by any new trial, and that the judgment is right even if the first point should fail. If either point were decided the other way it would virtually repeal the act.

Were the balance of equities considered it would be against a man who takes goods knowing nothing about them. I think the judgment should be affirmed.

LOPES, J.: I also think the judgment should be affirmed. I quite agree with everything said by my Brother Grove on the second point and in the reasons so elaborately given on which we have arrived at that conclusion. But with respect to the first point I differ with great hesitation from the view taken by my learned Brother. I am not prepared to go the length of holding that a prior bill of sale, void against an [318] execution creditor because not \*registered, can have the effect of rendering inoperative, as against the execution creditor, a subsequent bill of sale given by the holder of the unregistered bill of sale and properly registered. This is, however, immaterial for the decision of this case, which can be decided on the other point: I think the judgment should be affirmed on the second point. *Rule discharged.*

Solicitor for plaintiff: *W. T. Boydell.*

Solicitor for claimant: *Poncione.*



[5 Common Pleas Division, 318.]

May 14, 1880.

## LAZARUS V. ANDRADE.

*Bill of Sale—Assignment of Future-acquired Property—Stock-in-Trade, Substitution of.*

By bill of sale the grantor assigned to the grantee the stock-in-trade then in certain specified premises, and also the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises, either in addition to or in substitution for stock-in-trade therein at the date of the bill of sale:

*Held*, by Lopes, J., that the assignment was sufficient to pass the property in stock-in-trade afterwards brought into the premises in addition to or in substitution for that previously there.

**FURTHER CONSIDERATION.** An interpleader issue tried before Lopes, J., raised the question whether goods seized in execution of a judgment against one Phillips were the property of the plaintiff, or of the defendant, the execution creditor. The plaintiff claimed under and proved a bill of sale by which Phillips, for the consideration therein mentioned, had assigned to the plaintiff "all and singular the stock-in-trade, chattels, goods, and effects now being in, upon, or about the messuage or dwelling house, warehouse, and premises situate and being No. 62 Wilson Street, Finsbury, in the county of Middlesex, the particulars whereof are set forth in the schedule hereunder written. And also the stock-in-trade, goods, chattels, and effects which shall or may at any time or times during the continuance of this security be brought into the aforesaid messuage or dwelling house, warehouse, and premises, or be appropriated to the use \*thereof, either in addition to or in substitution [319 for stock-in-trade, goods, chattels, and effects now being therein, or any of them." The schedule, specifying the contents of a warehouse, set out various quantities of ostrich and other feathers, and some business furniture. Some stock-in-trade afterwards brought on to the premises in addition to or substitution for that which was there at the date of the bill of sale was seized as aforesaid.

*Crispe*, and *Hart*, for the plaintiff: The bill of sale, being an absolute assignment of future-acquired goods thereafter to be brought on to the messuage mentioned, passes the property in them, *Holroyd v. Marshall* (<sup>1</sup>), and is not a mere license to seize, as in *Reeve v. Whitmore* (<sup>2</sup>).

*Bullen*, for the defendant: The doctrine of *Holroyd v. Marshall* (<sup>1</sup>) only applies to subsequently acquired property when so specifically described as to be identified: Benjamin

(<sup>1</sup>) 10 H. L. C., 191.(<sup>2</sup>) 38 L. J. (Ch.), 63.

1880

Lazarus v. Andrade.

on Sale, 2d ed., p. 65, citing *Belding v. Reed* (<sup>1</sup>), where a bill of sale purported to convey all the bankrupt's property being or hereafter to be upon or about his dwelling house, farm, and premises situate at Reedham or elsewhere in the kingdom of Great Britain, and Pollock, C.B., said, "the defendant could not lawfully seize property which the bankrupt acquired after the bill of sale was executed; and in this view I see nothing inconsistent with the principle laid down in *Holroyd v. Marshall* (<sup>2</sup>).” Nothing has earmarked or identified the future-acquired property. In *Leatham v. Amor* (<sup>3</sup>) additional machinery, which had been brought on to the premises after the date of the bill of sale comprising future property, was annexed to the machinery there when the bill of sale was given, and the court thought it had "become specific."

*Crispe* replied.

*Cur adv. vult.*

May 14. LOPES, J.: This bill of sale purported to assign to the plaintiff all the stock-in-trade, chattels, goods, and effects in the messuage, particulars whereof were set forth in a schedule there under written. And also the stock-in-  
320] trade, goods, chattels, and \*effects, which should or might at any time or times during the continuance of the security be brought into the messuage, warehouse, and premises, or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade, chattels, and effects now being therein, or any of them.

The sheriff had seized stock-in-trade not being contained in the said schedule, nor in the premises when the bill of sale was executed, but other stock-in-trade not comprised in the schedule which had been brought into the premises by the grantor subsequently to the date of the bill of sale. Such last mentioned property had been brought into the premises in addition to or in substitution for stock-in-trade in the premises when the bill of sale was executed.

It was contended for the defendant (the execution creditor) that the goods brought into the premises subsequently to the execution of the bill of sale did not pass to the plaintiff, and that the title of the defendant in respect of them was preferable to the title of the plaintiff (the claimant). *Holroyd v. Marshall* (<sup>2</sup>) and *Leatham v. Amor* (<sup>3</sup>) were relied on by the plaintiff, and *Belding v. Reed* (<sup>1</sup>) by the defendant. The principle deducible from these decisions is that property to be after-acquired, if described so as to be capa-

(<sup>1</sup>) 3 H. & C., 955.

(<sup>2</sup>) 10 H. L. C., 191.

(<sup>3</sup>) 47 L. J. (Q.B.), 581.

(<sup>4</sup>) 10 H. L. C., 193.

ble of being identified, may be, not only in equity but also at law, the subject-matter of a valid assignment for value. The contract must be one which a court of equity would specifically enforce. *Belding v. Reed* (1) was decided before the Judicature Acts, and is distinguishable from the present case. The ground of that decision was, that the description "all other the personal estate and effects whatsoever now being or hereafter to be on the premises or elsewhere in the United Kingdom," was so vague that it did not entitle the claimant to institute a suit for specific performance of the contract. Neither the character of the property nor its whereabouts was indicated, and there was nothing to earmark it. In this case the property is to be brought into the premises or to be appropriated to the use thereof, either in addition to or in substitution for property then on the premises. I think the assignment sufficiently specific, the property in question having become specific by being brought on to the premises in addition to or in sub- [321] stitution for property mentioned in the schedule. The case of *Leatham v. Amor* (2) is a strong authority in favor of this view.

*Judgment for the plaintiff.*

Solicitors for plaintiff: *Noon & Clarke.*

Solicitors for the defendant: *Stallard & Whitting.*

(1) 3 H. & C., 955.

(2) 47 L. J. (Q.B.), 581.

4 Southern Law Rev. (N.S.), 199; 6 id., 221; 13 U. C. L. J., 257; 15 Am. Law Rev., 121.

As between the parties, a sale of, or chattel mortgage on property to be acquired, is valid.

**Canada, Upper:** *Perrin v. Wood*, 21 Grant's Chy., 492.

**Georgia:** *Goodrich v. Williams*, 50 Ga., 425; *Green v. Rogers*, 62 id., 166, under Georgia Code.

**Michigan:** *American, etc., v. Foster*, 36 Mich., 368.

**Mississippi:** *Davis v. Marx*, 55 Miss., 376, 378, and cases cited.

But see *Everman v. Robb*, 52 Miss., 658.

**Missouri:** *Wright v. Bircher*, 5 Mo. App., 322, affirmed 72 Mo., 179.

**New York:** *Ludwig v. Kipp*, 20 Hun, 265.

See *Levy v. Welsh*, 2 Edw. Chy., 498; *Spies v. Boyd*, 1 E. D. Smith, 445; *Van Heusen v. Radcliff*, 17 N. Y., 50; *Carpenter v. Simmons*, 28 How.

Pr., 13; *Mittnacht v. Kelly*, 3 Keyes, 407, 3 Abb. Dec., 301.

**Rhode Island:** *Williams v. Winsor*, 12 R. I., 9.

**Tennessee:** See *Phelps v. Murray*, 2 Tenn. Chy., 746.

**United States, Circuit and District:** *Barnard v. Norwich, etc.*, 4 Cliff., 351; *Brett v. Carter*, 2 Lowell, 458, 461-3, and cases cited, 3 Cent. L. J., 286.

**Wisconsin:** But see in this state, *Hunter v. Bosworth*, 43 Wisc., 583, 591, and cases cited.

So, as between a mortgagee and a subsequent purchaser, in good faith, of the goods, who had actual knowledge of the mortgage.

**Michigan:** *American, etc., v. Foster*, 36 Mich., 368; *Robson v. Mich. Cent.*, 37 Mich., 70.

**Missouri:** *Wright v. Bircher*, 5 Mo. App., 322.

**United States, Circuit and District:** *Barnard v. Norwich, etc.*, 4 Cliff., 351.

1880

Lazarus v. Andrade.

Though after-acquired property may pass by sale or mortgage, it passes subsequent to the rights of others therein or thereto at the time the mortgagor acquires his title, i. e., to rescission on account of fraud, etc.: *Williamson v. New Jersey, etc.*, 29 N. J. Eq., 311; *Myer v. Car Co.*, 102 U. S. R., 1.

In some of the States, a sale of, or chattel mortgage on property to be acquired, is held invalid.

**Maine:** *Farrar v. Smith*, 64 Me., 77.  
**Massachusetts:** *Moody v. Wright*, 13 Metc., 17; *Bernard v. Eaton*, 2 Cush., 294; *Pettis v. Kellogg*, 7 id., 456.

But see *Chase v. Denny*, 130 Mass., 568; *Pierce v. George*, 108 id., 78, 11 Am. Rep., 310, 314 note.

**Rhode Island:** *Williams v. Winsor*, 12 R. I., 9.

**Tennessee:** *Phelps v. Murray*, 2 Tenn. Chy., 746.

At law, a bill of sale or conveyance cannot pass the property in goods which are not in existence, or which do not belong to the grantor at the time the deed is given; though in equity, such a contract would operate to transfer to the vendee the beneficial interest in the property as soon as it was acquired by the grantor, and the grantee might enforce specific performance of the contract: *Lloyd v. European, etc.*, 2 Pugs. & Burb. (New Brunsw.), 194.

See also *Nicholson v. Temple*, 4 Pugs. & Burb., 248.

A sale of, or chattel mortgage upon property not in existence, or not then acquired, does not, as between the parties, in law, pass title, yet it gives the vendee or mortgagee license to seize such property, and after such seizure the title passes; in equity it transfers the beneficial interest, without the intervention of any new act, which attaches immediately upon the coming into existence or the acquisition of the property.

**Mississippi:** *Cayce v. Stovall*, 50 Miss., 396.

**New York:** *Wisner v. Ocumpaugh*, 71 N. Y., 113; *McCaffrey v. Woodin*, 65 id., 459, 22 Am. R., 644, 659 note, reversing 62 Barb., 316, and distinguishing *Otis v. Sill*, 8 id., 102, *Gardner v. McEwen*, 19 N. Y., 123, *Milliman v. Nehr*, 20 Barb., 37.

See *Cressy v. Labre*, 17 Hun, 120; *Gardner v. McEwen*, 19 N. Y., 123;

*Mitnacht v. Kelly*, 3 Abb. App. Dec., 301, 3 Keyes, 407; *Conderman v. Smith*, 41 Barb., 404.

**Rhode Island:** See *Cook v. Corthell*, 11 R. I., 482; *Williams v. Briggs*, Id., 476; *Groton, etc., v. Gardner*, Id., 626, 627.

**South Carolina:** *Parker v. Jacobs*, 14 S. C., 112, 115, and cases cited.

**Tennessee:** See *Phelps v. Murray*, 2 Tenn. Chy., 746, 751 *et seq.*, and cases cited.

And some cases hold the same doctrine as to attaching, or execution creditors.

**New York:** *McCaffrey v. Woodin*, 65 N. Y., 462.

**South Carolina:** *Parker v. Jacobs*, 14 S. C., 112, 115, and cases cited.

Crops which have been sown have a potential existence, and may be sold or mortgaged as existing property. So crops to be sown upon land then owned by the vendor or mortgagor, wool upon sheep, or expected products from a dairy.

**Alabama:** *Stearns v. Gafford*, 56 Ala., 544.

**California:** *Rider v. Edgar*, 54 Cal., 127.

**Illinois:** *Hansen v. Dennison*, 7 Bradwell, 73.

**Indiana:** *Duke v. Strickland*, 43 Ind., 494.

**Kentucky:** But see *Vinson v. Hollowell*, 10 Bush, 538.

**Maine:** *Farrar v. Smith*, 64 Maine, 74, 77, and cases cited.

**Mississippi:** *Cayce v. Stovall*, 50 Miss., 396, 399.

**New York:** *Andrew v. Newcomb*, 32 N. Y., 417; *Cressy v. Labre*, 17 Hun, 120, 122-3, and cases cited; *Van Hoozer v. Corey*, 34 Barb., 9; *Johnson v. Crofoot*, 37 How. Pr., 59; *Conderman v. Smith*, 41 Barb., 404.

See *Milliman v. Nehr*, 20 Barb., 37.

**Tennessee:** See *Thurman v. Jenkins*, 2 Baxt., 426.

**United States, Supreme Court:** *Butt v. Ellett*, 19 Wall., 544, affirming 1 Woods, 214.

In some of the States it is held, that crops to be raised in the future, by the industry of the mortgagor, the seed not being in the ground at the time of executing the mortgage, having no potential existence, do not pass under the mortgage, and the mortgagee, not

having taken possession thereof after sown, cannot hold them as against an execution creditor of the mortgagor.

**Illinois:** *Stowell v. Blair*, 5 Bradw., 104; *Gettings v. Nelson*, 86 Ills., 593; *Roy v. Goings*, 6 Bradw., 162.

**Massachusetts:** *Chase v. Denny*, 130 Mass., 568.

**New York:** As between the mortgagor's personal representatives and the mortgagee, see *Cressy v. Labre*, 17 Hun, 120.

It seems that at law such a mortgage would be held good if the mortgagee had taken possession under his mortgage, and perhaps in equity, without his so taking possession: *Roy v. Goings*, 6 Bradw., 162, 164, and cases cited; *Gettings v. Nelson*, 86 Ills., 591; *Stern v. Simpson*, 62 Ala., 194; *McCaffrey v. Woodin*, 65 N. Y., 462; *Parker v. Jacobs*, 14 S. C., 115; *Chase v. Denny*, 130 Mass., 566; *Dunlop v. Tutty*, 2 Victorian R. (Law), 14; *Cook v. Corbell*, 11 R. I., 482.

See *Reeve v. Whitmore*, 4 De Gex., Jones & Smith, 1, and cases cited by Mr. Perkins in note to Little, Brown & Co.'s ed.; *Cressy v. Labre*, 17 Hun, 120; *Phelps v. Murray*, 2 Tenn. Chy., 746.

Though many cases hold that a sale or mortgage of an unplanted crop, to be sown upon land held by the vendor or mortgagor, is valid.

**Alabama:** *Grant v. Steiner*, 65 Ala., 499; *Jones v. Webster*, 48 id., 9.

**Arkansas:** *Apperson v. Moore*, 30 Ark., 56; *Driver v. Jenkins*, Id., 120.

**California:** *Arques v. Wasson*, 51 Cal., 620.

**Mississippi:** *White v. Thomas*, 52 Miss., 49.

**New York:** *Conderman v. Smith*, 41 Barb., 404; *Van Hoozer v. Cory*, 34 Barb., 9; *McCaffrey v. Woodin*, 65 N. Y., 459; *Cressy v. Labre*, 17 Hun., 122.

Where the vendor of lands retains a lien on the future crops for the payment of the purchase money, and the title to the same is to be absolute only when the conditions of the sale have been complied with; held, that his right to the crop, until the purchase money be paid, is superior to that of beneficiaries under a trust conveyance made subsequent to the registration of the lien to secure them in the advance-

ment of moneys to his vendee: *Polk v. Foster*, 7 Baxter (Tenn.), 98.

By a contract between A. and B., all the colts thereafter foaled by certain mares sold by B. to A. and kept in B.'s stables under A.'s care, were to belong to A.

Held, 1. That a valid sale could be made of the colts before they were foaled: *Hull v. Hull*, 48 Conn., 250.

In this case, as the mare was actually sold to A., it would seem she would be the owner of colts foaled by her own mare. The question as to whether the mare remaining in B.'s possession rendered the sale of her fraudulent as to creditors, the court held did not apply to the foals, because they were not in existence at the time of the sale of the mare and of the agreement.

But see *Nicholson v. Temple*, 4 Pugs. & Burb., 248.

Railway mortgages upon "all property now belonging, or that may at any time hereafter belong to said company and be used as a part of said railroad or be appurtenant thereto, or necessary for the construction or operation thereof," create a valid lien upon property afterwards procured by the company for the use of the road.

**Arkansas:** *Little Rock, etc., v. Page*, 35 Ark., 304.

**Connecticut:** *Buck v. Seymour*, 46 Conn., 156.

**Illinois:** *Quincy v. Chicago, etc.*, 94 Ills., 537.

**Maine:** *Harmlin v. European, etc.*, 72 Maine, 83.

**Mississippi:** But see *Mississippi, etc., v. Chicago*, 58 Miss., 896.

**New Jersey:** *Coe v. Delaware, etc.*, 34 N. J. Eq., 266.

**United States, Supreme Court:** *Myer v. Car Co.*, 102 U. S. R., 1.

A bill of sale of so much of a growing crop of cotton as will make two bales, each weighing not less than 500 pounds, as against an execution creditor, passes no title to any of the crop before separation of the two bales from the mass of the crop: *Williamson v. Steele*, 3 Lea (Tenn.), 327; *Stephens v. Sauter*, 49 N. Y., 35; *Richardson v. Alpena, etc.*, 40 Mich., 203; *Blakeley v. Patrick*, 67 N. C., 40.

See *Pettis v. Kellogg*, 7 Cush., 456. Defendant executed and delivered to plaintiff a bill of sale of the produce

upon a farm sold and conveyed at the same time by him to plaintiff, and also "all the personal property and effects" named in a schedule annexed.

The schedule, after naming a variety of live stock and farming implements, contained this clause: "Also all other personal property of every name and kind whatsoever on the Allen farm above referred to, and this day conveyed to Gilbert Durant by N. H. Allen and wife, including two full beds in good order and the bedding of the same, consisting of, for each bed, two pillows, two sheets, two blankets, one straw bed, one feather bed, and the bedstead for each bed, hereby intending to sell and convey to said Durant all the personal property and effects on said farm, except the household furniture and furnishings of all kinds in the house, aside from the two beds and bedsteads before mentioned."

The property in question consisted of a rifle, a gun and a pistol, and were in the house at the time of the purchase.

Held, that they were not included in the bill of sale; that the subject of negotiation was the farm and personal property connected therewith, and said articles having no connection with the farm, it was not to be presumed that they were in the contemplation of the parties, as in order to pass title the bill of sale should be clear and free from reasonable doubt; that the general words would be construed as covering only the same kind of property as the items enumerated: *Durant v. Allen*, 65 N. Y., 562.

A mortgage upon certain oats "now growing and standing" does not cover oats already cut, though in the field designated in the mortgage: *Ford v. Sutherland*, 2 Mont., 440.

A clause in a chattel mortgage upon a stock of goods, which purports to extend the lien of the mortgage over after-acquired property, does not render the mortgage absolutely void, where there is no arrangement permitting the mortgagor to deal with the goods mortgaged, and no knowledge of such dealing on the part of the mortgagee, and the absence of an intent to defraud creditors is affirmatively found: *Yates v. Olmsted*, 56 N. Y., 632.

In some of the States it is held that a chattel mortgage upon the stock of goods of a merchant, and upon all

goods hereafter purchased and added to such stock, is valid as to such after-acquired property:

**Michigan:** *Leland v. Collyer*, 34 Mich., 418.

See *People v. Bristol*, 35 Mich., 28.

And in others, not:

**Massachusetts:** *Barnard v. Eaton*, 2 Cush., 294.

**Tennessee:** *Phelps v. Murray*, 2 Tenn. Chy., 746.

In some of the States it is held, that a mortgage by a merchant of his stock-in-trade, with power to sell therefrom and to carry on his business, is valid; that the power of sale does not render the mortgage fraudulent as to creditors: See *Brett v. Carter*, 2 Lowell, 460-1, and cases cited; 5 South. Law Jour. (N.S.), 617; 20 Alb. L. J., 506; 2 Southern L. Rev. (N.S.), 732; 5 id., 617; 6 id., 96.

**Canada, Upper:** *Ross v. Conger*, 14 U. C. Q. B., 525.

**English:** See *Taylor v. M'Keand*, post, p. 843.

**Iowa:** *Hughes v. Corey*, 20 Iowa, 399.

**Kansas:** *Frankhouse v. Ellet*, 22 Kans., 127.

**Kentucky:** See *Ross v. Wilson*, 7 Bush, 29.

**Maine:** See *Abbott v. Goodwin*, 30 Maine, 408; *Allen v. Goodnow*, 71 id., 420.

**Massachusetts:** *Briggs v. Parkman*, 2 Metc., 258; *Jones v. Haggerford*, 3 id., 515; *Cobb v. Farr*, 16 Gray, 597.

**Michigan:** *Gay v. Bidwell*, 7 Mich., 519; *People v. Bristol*, 35 id., 28; *Wingler v. Sibley*, Id., 229; *Leland v. Collyer*, 34 id., 418.

**Rhode Island:** *Williams v. Winsor*, 12 R. I., 9.

**United States, Circuit and District:** *Brett v. Carter*, 2 Lowell, 458, 460.

In others, the contrary is held:

**Illinois:** *Goodheart v. Johnson*, 88 Ills., 58; *Dunning v. Mead*, 90 id., 376.

**Indiana:** *Mobley v. Letts*, 61 Ind., 11; *Davenport v. Foulke*, 68 id., 382.

**Iowa:** See *Crooks v. Stuart*, 2 McCrary, 13.

**Minnesota:** *Horton v. Williams*, 21 Minn., 186; *Stein v. Murch*, 24 id., 390; *First, etc., v. Anderson*, Id., 435.

**Missouri:** *State v. Jacob*, 2 Mo. App., 183, 185, and cases cited; *State v. Tasker*, 31 Mo., 445; *State v. D'Oench*, Id., 453; *Reed v. Pelletier*, 23 id., 177.

**Nebraska:** Hedman v. Anderson, 6 Neb., 392.

**New Hampshire:** Putnam v. Os-good, 51 N. H., 192.

**New York:** Southard v. Benner, 72 N. Y., 425, affirming 7 Daly, 40, 5 Abb. N. C., 184; Wagner v. Jones, 7 Daly, 375, affirmed on another point, 72 N. Y., 590; Ford v. Williams, 13 N. Y., 577; Russell v. Winne, 4 Abb. (N. S.), 384, 37 N. Y., 591; Edgell v. Hart, 9 id., 213; Griswold v. Sheldon, 4 id., 581; Dutcher v. Swartwood, 15 Hun, 31, 33, and cases cited; City Bank v. Westbury, 16 id., 458; Arnold v. Morris, 7 Daly, 498; Spies v. Boyd, 11 N. Y. Leg. Obs., 54; Carpenter v. Simmons, 28 How. Pr., 13; Marston v. Vultee, 8 Bosw., 129.

See Brown v. Platt, 8 Bosw., 324.

**Ohio:** Collins v. Myers, 16 Ohio St. R., 547; Freeman v. Rawson, 5 id., 1; Harman v. Abbey, 7 id., 218; Canfield v. Lathrop, (Cleveland Law Rec., 67.

**Oregon:** Orton v. Orton, 7 Oregon, 478.

**Tennessee:** Phelps etc., v. Murray, 2 Tenn. Chy., 746.

**United States, Supreme Court:** Robinson v. Elliot, 22 Wall., 513, on Indiana statute.

**United States, Circuit and District:** Matter of Forbes, 5 Bissell, 510, Northern Dist., Ills.; Crooks v. Stuart, 2 McCrary, 13, on statute Iowa.

**Virginia:** Perry v. Shenandoah, etc., 27 Gratt., 755.

**West Virginia:** Garden v. Bodwings, 9 W. Va., 121.

**Wisconsin:** Fisk v. Harshaw, 45 Wisc., 665; Blakeslee v. Rossman, 43 id., 116.

A chattel mortgage containing a provision allowing the mortgagor to sell the property covered by it at retail for his own benefit is fraudulent as to his creditors, and one to whom he has made a general assignment may, under chapter 314 of 1858, treat the mortgage as void, and take and retain the property covered thereby.

*Semble*, that the right given by that statute to the assignee to have a transfer of property by the debtor declared void, extends only to defects based upon fraud or fraudulent intent.

A chattel mortgage, given to secure the plaintiff for indorsing notes of the mortgagor, provided that the mortgagor should have the privilege of selling

any of the mortgaged property which he then had on hand and in stock, or which he might thereafter purchase to replenish his stock, provided that the stock should not be reduced below \$6,000.

Upon the trial of this action, brought to recover the property from a general assignee of the mortgagor, the plaintiff offered to show that prior to and at the time of the giving of the mortgage, it was agreed that the goods were to be sold and the notes paid with the proceeds thereof.

Held, that the parol evidence was inadmissible as contradicting the terms of the mortgage.

That even if the agreement was proved, it would not render the mortgage valid, as it did not require the sales to be made for *cash*: Ball v. Slaf-ter, 26 Hun, 353, criticising and distinguishing Ford v. Williams, 24 N. Y., 359.

The fact that the mortgagor continues to sell the mortgaged property (goods in a store), with the knowledge of the mortgagee, in the absence of proof that this was pursuant to an agreement between the parties, does not render the mortgage fraudulent in law as against other creditors: Frost v. Warren, 42 N. Y., 204; Fisk v. Harshaw, 45 Wisc., 665; Cotton v. Marsh, 3 id., 221; Arnold v. Morris, 7 Daly, 498; Boys v. Smith, 8 U. C. Com. Pl., 248; Barkow v. Sanger, 47 Wisc., 500; Weber v. Armstrong, 70 Mo., 217.

Where a chattel mortgage was void because it authorized the mortgagor to sell the mortgaged property, but the mortgagor, before any hostile proceeding by any creditor voluntarily, in good faith, delivered the property to the holder of the mortgage, for the purpose of being applied in payment of the mortgage debt, and authorized him to sell the property for that purpose; held, that under this delivery and authority, the mortgage creditor could hold the property against any creditor subsequently proceeding against the mortgagor: First, etc., v. Anderson, 24 Minn., 435.

A chattel mortgage of a stock of goods in a store, with power to the mortgagor to sell in the ordinary course of trade, although fraudulent and void as to creditors and subsequent purchasers in good faith, is valid between the parties to it. And a vendee who

1880

Elphick v. Barnes.

purchases the entire stock of goods, with the intent to hinder and delay creditors, cannot hold such goods against the mortgage, although it was not received until after the pretended purchase: *Gregory v. Whedon*, 8 Neb., 373.

A power in a chattel mortgage to sell portions of the property and to pay over the proceeds of the sale to the mortgagee upon the mortgage debt, is valid, and such a mortgage is not void as to creditors:

**Illinois:** *Goodheart v. Johnson*, 88 Ills., 58.

**Maine:** *Abbott v. Goodwin*, 20 Maine, 408.

**New York:** *Ford v. Williams*, 24 N. Y., 359; *Conkling v. Shelly*, 28 id., 360; *Ostrander v. Fay*, 8 Abb. Dec.,

431; *Caring v. Richmond*, 22 Hun, 369; *Miller v. Lockwood*, 32 N. Y., 293.

See *City Bank v. Westbury*, 16 Hun, 458.

**Ohio:** *Kleine v. Katzenberger*, 20 Ohio St. R., 110.

A mortgage upon logs and lumber did not authorize the mortgagor to sell the property, but in effect provided that the lumber mortgaged and that which should be manufactured from the logs should be delivered to the mortgagees, and received by them at a price which they had previously paid the mortgagor for such lumber, and the value thereof should be applied on the mortgage debt. Held, that the mortgage was not fraudulent in law: *Johnson v. Curtis*, 42 Barb., 588.

[5 Common Pleas Division, 321.]

March 18, 1880.

### ELPHICK V. BARNES.

*Sale of Goods—Goods sold and delivered—Conditional Sale of a Horse—Death of the Horse before the Sale became absolute.*

A horse was sold by the plaintiff to the defendant upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:

Held, by Denman, J., that the plaintiff could not maintain an action for the price, as for goods sold and delivered.

**STATEMENT OF CLAIM.** 1. The plaintiff is a cattle dealer residing at Brighton; and the defendant is a dairyman also residing at Brighton.

2. On the 31st of July, 1879, the plaintiff sold and delivered to the defendant, and the defendant bought and received from him, a horse and cow at the price of £65, which sum the defendant has neglected and refuses to pay.

**Statement of defence.** 1. The defendant admits that he agreed to purchase of the plaintiff a horse and cow.

2. The said animals were not sold or purchased together at the price of £65, but were purchased under two separate and distinct contracts. The price of the horse was £40, and the plaintiff warranted it sound and well, and it was sold to the defendant on the terms that if it did not answer to the said warranty, or suit the defendant, the defendant should be at liberty to reject the same. The horse was neither



sound nor well at the time of the sale to the defendant, but was suffering from internal inflammation, and in consequence of such unsoundness and illness it \*died before a reasonable time in which to return the same to the plaintiff had elapsed. The defendant on discovery of the said unsoundness repudiated the contract and gave notice thereof to the plaintiff. [322

3. The cow was sold to the defendant for £25. The defendant was always ready and willing to pay the £25 to the plaintiff, and before action tendered and offered to the plaintiff to pay him the same, but the plaintiff refused to accept it; and the defendant brought £25 into court, &c.

4. By way of counter-claim the defendant claims from the plaintiff damages for the breach of the above mentioned warranty of the horse, whereby the same died and became and was worthless to the defendant, and the defendant lost the value of the horse and the price, and the profit he would have made from the sale of the same, &c.

Reply. 1. Joinder of issue upon the statement of defence.

2. As to the counter-claim, the plaintiff denies that he gave any such warranty as alleged, and further states that the horse mentioned in the pleadings was sound and well at the time of the sale thereof to the defendant. Issue.

The cause was tried before Denman, J., at the last Spring Assizes for Sussex, and was afterwards argued before him, upon further consideration, by *Grantham*, Q.C., and *Houghton*, for the plaintiff, and by *Day*, Q.C., and *Gore*, for the defendant. The learned judge took time to consider.

The facts and arguments are fully set out in the judgment, which was as follows:

March 13. DENMAN, J.: The plaintiff in this case sued the defendant for £65, the price of a horse and a cow sold and delivered.

The defendant admitted that he agreed to purchase a horse and a cow, but alleged that they were not sold or purchased together at £65, but under two separate and distinct contracts. There was conflicting evidence as to this part of the defence: but, upon the argument before me (there having been no finding of the jury upon the point), it was agreed that I should decide the question; and I found for the defendant, that there were two \*separate and distinct contracts, the horse being to be sold for £40, and the cow for £25. The latter amount was paid into court; and no question remains for decision except that arising upon the defendant's answer to the plaintiff's demand so far as [323

1880

Elphick v. Barnes.

the price of the horse was concerned. This answer as set out in the statement of defence was as follows: "The price of the said horse was £40, and the plaintiff warranted it sound and well, and it was sold to the defendant on the terms that, if it did not answer the said warranty *or suit the defendant*, the defendant should be at liberty to reject the same. The said horse was neither sound nor well at the time of the sale to the defendant, but was suffering from internal inflammation, and in consequence of such unsoundness and illness, *it died* before a reasonable time in which to return the same had elapsed. The defendant, on discovery of the unsoundness, repudiated the contract, and gave notice thereof to the plaintiff."

The jury found that there was no warranty of soundness, and that the horse was in fact sound at the time when the bargain was made. But the defendant's counsel at the trial relied not only on a warranty, but upon evidence that the plaintiff, at the time of the bargain being made, had agreed that the defendant might take the horse away and work him, and, if he did not suit the defendant by working in every kind of vehicle for which the defendant required him, the defendant might return him within eight days, and that, *if the horse was satisfactory*, the defendant should pay for him at that time, viz., at the end of the eight days. The bargain having taken place on Thursday, the 31st of July, the horse died on Sunday, the 3d of August, in the defendant's stable, to which he had been removed on the 31st of July. Under these circumstances, the defendant's counsel contended that the defendant was not liable, because the bargain was a conditional one, and, the sale not having become absolute before the death of the horse, an action for goods sold and delivered would not lie.

It was objected, for the plaintiff, that no such case ought to be left to the jury, because it was not raised by the statement of defence. But I was of opinion that this defence was one included in the statement of defence; that the pleadings might properly be amended if necessary, but that 324] it was not necessary to amend \*them; and that no injustice would be done by leaving the question to the jury. I therefore left it to the jury as follows: "Was the bargain on the 31st of July one for a sale out and out, or only for a sale conditional on the defendant finding the horse all right at the end of the eight days?" The jury found, in answer to that question, "that the bargain was conditional on the horse being *right* and with a trial for eight days." Being doubtful what the jury meant by "*right*," I asked them the

question; to which they replied, "suitable for the defendant's purposes, not contemplating the case of death." They afterwards added, in answer to a further question, "But for the complaint which came on after the bargain, we see no reason to suppose that the horse would not have been suitable for the defendant's purposes; by *trial*, we mean a trial as regards suitability, not as regards health." Taking all these findings together, I think they amount to a finding that the plaintiff sold the horse to the defendant upon a condition that the horse should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes.

The horse having died without fault of either party, the question is, whether the plaintiff can maintain his action for goods sold and delivered. I am of opinion that he cannot.

The case of *Ellis v. Mortimer* (1) shows that the defendant had the whole time allowed for the trial in which to decide whether he would return the horse or not. I think it clear that no action for goods sold and delivered would have lain at any time before the eight days had expired, in case the horse had lived. But before the eight days had expired the horse died. If the defendant were to be fixed with the price of the horse, he would be compelled to pay for something different from what he had bargained for, viz., a horse of which he should have had eight days' trial. The finding that the horse might or probably would have suited the defendant's purposes does not appear to me to be sufficient reason for fixing the defendant as the absolute owner of the horse. The option was his at the moment of the horse's death, and down to a later period if the horse had lived.

The case of *Rugg v. Minett* (2), which was relied upon for the plaintiff, does not appear to me to apply, be- [325  
cause that was not a case in which the buyer of the goods which were destroyed had any option as to whether he should become the purchaser or not, but, at the time of the destruction of the goods, he had by virtue of the bargain and of what had passed become the absolute owner of the goods in respect of which he was held liable. Nor, in my opinion, does the dictum of Coleridge, J., in *Moss v. Sweet* (3), which was relied upon for the plaintiff, help the plaintiff's contention in this case. That was a case in which, the defendant having taken delivery of goods "on sale or return," and having kept the goods, it was held that the sale was complete if the goods had not been returned within

(1) 1 N. R., 257.

(2) 11 East, 210.

(3) 16 Q. B., 495.

1880

Elphick v. Barnes.

a reasonable time, and that the common count for goods sold and delivered would suffice. Coleridge, J., in that case says: "The goods in question passed on condition that, unless returned, that is, at the option of the buyer, within a reasonable time, they were to be taken as sold to him. That condition was at an end after the lapse of a reasonable time without a return of the goods; and the sale was then complete." He does not say that it was complete *before* that time. He does go on to say,—“The same consequence would follow where goods are destroyed or injured, so that a return within the meaning of the contract becomes impossible.” This was relied upon as referring to an accidental destruction, such as by death or fire. I think it clear that this was not the meaning, but that the learned judge referred to destruction of or injury to the goods being the act of the defendant, in which case of course the defendant would have been liable as much as if he had kept them an unreasonable time.

The case of *Head v. Tattersall* (1) is nearer to the present case. That was an action for money received, to recover back the price of a horse which had been sold at Tattersall's with a warranty and a condition that the plaintiff was to be at liberty to return the horse, if it did not answer the description, up to the following Wednesday. The horse was injured on its way home, and depreciated in value, but without any fault of the plaintiff's servant, who was taking it home. The horse, being found not to correspond with the [326] warranty, was returned within the time: and it \*was held that the plaintiff had a right to return it and recover back the price, notwithstanding that he was unable to return it in the same condition. It was attempted to distinguish that case from the present, on the ground that there was a right to return the horse on a specific ground, on which it was in fact returned. But I can see no difference in principle between such a case and the case in which the purchaser has an option to return the horse on any ground still remaining to him at the time at which the event occurs which renders it impossible for him to exercise that option, and so to have the whole benefit of his bargain. In such a case, I think the sale to him cannot be considered to be absolute at the time of the accident occurring. The maxim of *ne perit domino* applies, I think, in such a case much more reasonably as against the unpaid contingent vendor than as against the possible vendee still having an option to return at the end of a period not yet expired. I think the law relating to

(1) Law Rep., 7 Ex., 7; 1 Eng. R., 140.

such a case is accurately stated by Mr. Benjamin in p. 483 of the 2d edition of his work on Sales, where he lays it down as follows, speaking of "sales on trial," or "sales on approval," in which cases, he says, "There is no sale until the approval is given either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial." Here, I think, there was no sale at the time of the horse's death, which happened without the fault of either party, and therefore that the action for goods sold and delivered must fail: and I give judgment for the defendant, except so far as relates to the costs of and occasioned by the allegations of warranty and unsoundness, which costs I order to be paid by the defendant,—such costs to be set off against the defendant's costs, on taxation.

*Judgment for the defendant.*

Solicitor for plaintiff: *Thomas A. Goodman*, Brighton.

Solicitors for defendant: *Lamb & Everett*, Brighton.

See 25 Eng. R., 514 note; 29 id., 293 note; 1 id., 148 note; 9 Pacific L. J., 545.

*Conditional sales* were valid at common law, and their validity was not affected by the English statute of frauds, nor are they within the recording acts of the State of Arkansas.

Such sales, oral or in writing, are valid in Arkansas, and creditors of, and purchasers from, the conditional vendee acquire no right to the property as against the vendor who has been guilty of no fraud and no laches in asserting his rights: *Blackwell v. Walker Bros.*, 2 McCrary, 33, East. Dist., Ark.

A. delivered to B. a sewing machine under a contract of sale, title not to pass until all specified instalments were paid, and on default of any payment, A. to be at liberty to take the machine away at his option.

Held, that on default of a payment, A. could not replevy the machine from B.'s possession without demand or notice of option and refusal of B. to surrender it; that the possession of the machine by B.'s wife, living with him, was B.'s possession; that a demand on the wife was insufficient, and that the mere fact that she had made all previous payments did not establish her agency to act for B. in the matter of demand and refusal; that replevin did lie, the right of possession at the commencement of the action being in the

defendant: *Wheeler & Wilson Manuf. Co. v. Teetzlauff*, 53 Wisc., 211, 6 Vir. L. J., 372.

The defendant received of the plaintiff an organ, and signed and delivered to him the following agreement prepared by the plaintiff: "The subscriber has, this 21st day of Dec., 1877, rented of H. (the plaintiff) one choral organ, during the payment of rent as herein agreed, for the full rent of \$190, payable as follows: One melodeon valued at \$50 as first payment, and one note for \$140, due Jan. 15, 1879; with the understanding that if I shall have punctually paid all said rent, I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due, all my rights herein shall terminate and said H. may take possession of said organ." Held, not to be a lease of the organ, but a conditional sale, and that the plaintiff could not recover upon the \$140 note after the organ had been returned. The consideration of the note was not the mere right to pay for and receive title to the organ, but the actual purchase and the acquisition of title as an accomplished fact. When, therefore, the purchase failed there was a complete failure of consideration: *Hine v. Roberts*, 48 Conn., 267.

Under a contract for the sale of a watch, by the terms of which the seller was to carry it thirty days, after which

1880

Elphick v. Barnes.

the sale should be consummated if the watch proved to be satisfactory: Held, that the transaction did not constitute a conditional sale until the thirty days had expired, and that before that time the watch was not subject to seizure in the hands of the party intending to purchase: *Mowbray v. Cady*, 40 Iowa, 604.

Where goods, sold to be paid for in cash or notes on delivery, are delivered to the purchaser without the cash or notes being given or delivered, the presumption is that the condition has been waived, and that a complete title vests in the purchaser. This presumption, however, may be rebutted by such declaration or acts of the parties, connected with the circumstances, as show an intention that the delivery should not be considered complete until performance of the condition.

The question with what intent the delivery was made, when any doubt arises, is one of fact. It seems, that if the delivery had been conditional, so that the title did not pass as between plaintiffs and B. & Co., the latter could, nevertheless, give a good title to a *bona fide* purchaser or pledgee: *Parker v. Baxter*, 86 N. Y., 586.

The defendants executed policies, acknowledging the receipt of the premiums for reinsurances, which their agent at St. John had accepted, and sent them to him for delivery, but afterwards hearing that a loss had occurred, and that the premiums had never been paid, they instructed him not to deliver the policies. The plaintiffs alleged that it was the custom of agents to give each other credit for such premiums, and to settle at the end of the month, when the balance, if any, was handed by one to the other; but no knowledge by defendants of such a course of dealing, nor such a course of dealing on the part of their agents was proved, and it was shown that their agents had no authority to reinsure, except upon payment of the premium.

Held (affirming 26 Grant, 561), that the defendants were not liable.

Held, also, that even if such a custom had been proved to exist between local agents, it would not be binding on the company unless authorized by it.

Held, also, that the defendants were not, under the circumstances, bound by their admission on the policy of the re-

ceipt of the premium: *Western Assurance, etc., v. Provincial Ins. Co.*, 4 U. C. App. Rep., 190, distinguishing *Xenos v. Wickham*, L. R., 2 H. L., 296.

Where one party claimed to have sold the other some zinc which the other disputed, and they agreed that if the plaintiff proved, to the satisfaction of G., that the zinc was received by defendants, they would pay him therefor. Held, that the action should be upon the agreement and not for goods sold, and that to recover, the vendor should have shown that he had proved the delivery of the zinc to the satisfaction of G., or at least that he had produced evidence which should have been satisfactory to them, and that not having done so he could not recover: *Wilson v. Gould*, 21 Hun, 446, 449.

If where a reaper was left on trial, and was to be kept only if defendant was suited with it, he is under no obligation to make a trial of it. "Such an arrangement gives the expected purchaser the privilege of trying the machine, but it leaves it quite to his own judgment whether he is suited, and if it is for his own judgment to decide whether he is suited, then the giving a fair trial is of no consequence. If the bargain had been, that if the reaper worked well the defendant was to keep it, then he might be bound to give it a fair trial. But if the bargain was only, that if it suited him he was to keep it, then the keeping it was left to his choice. He was to determine, and not a jury, whether or not it suited him": *Grant v. Burch*, 26 Hun, 376.

See *Lee v. Rutledge*, 51 Md., 311.

A machine was ordered by a person, on an agreement to try the same within a specified time according to certain directions, and to pay for it unless it should fail to work as represented by the vendor. Held, that if it had been ascertained by actual trial that machines exactly similar were necessarily incapable, from their construction, of doing what was promised for them, the person proposing to buy was not bound to put the particular one to the test of actual experiment: *Water's Patent v. Smith*, 120 Mass., 444.

Plaintiff having sold defendant a combined reaper and mower, with a warranty that if, upon one day's trial, it did not work well, it should, upon notice thereof, be put in order, it was

held, that the purchaser was authorized to try it not only as a mower but also as a reaper, and that he was not bound to give notice under the contract until he had tried it for both uses: *McCormick v. Basal*, 50 Iowa, 523.

A "reaper and self-binder" was delivered to a conditional purchaser in July and used in the harvest of that season, and found defective. In January or February following the vendor's agent called on the purchaser in relation to payment for the machine, and the purchaser said he would give nothing for it; but he still kept it and did not offer to return it until the following April. Held, that there was no error in setting aside a finding by the jury that the machine was returned in a *reasonable time*, and rendering judgment for its value: *Ganmon v. Abrams*, 53 Wisc., 323.

Where a written warranty given upon the sale of a threshing machine provided that if, upon notice of defects in the machine, the sellers failed to make it do good work, it should be returned by the buyer, and the payments made would be refunded or another machine furnished which would work satisfactorily, it was held, that an offer by the purchaser to return the machine, coupled with a demand for the return of his notes, was not such a compliance with the contract as would authorize him to claim a rescission of the contract of sale: *Pitt's Sons Manuf. Co. v. Spitznogle*, 54 Iowa, 86.

In the sale of a reaping machine, it was stipulated that if it failed to work as warranted, the owner might return it and be thereupon entitled to a repayment of the consideration. Evidence was introduced showing that the buyer, failing to make the machine work, returned it to the seller and demanded the surrender of the notes given therefor; that the seller refused to receive the machine or surrender the notes, but agreed to come to the premises of the seller and further test the machine; whereupon the buyer took the machine back home with him, and soon after the seller's agent came to test it, but could not make it work; that the buyer drove it into his yard and told the seller he might come and take it away, and that it had remained there for him ever since. Held, that the buyer had sufficiently complied with his agree-

ment to entitle him to recover the consideration: *Hall v. Aetna, etc.*, 30 Iowa, 216.

Where, in a contract for the sale of a harvester, with a warranty, it was provided that the cutting of five acres of grain with the machine should be conclusive evidence that the warranty was fulfilled, and more than five acres were cut by the purchaser, it was held, that he could not recover upon the warranty, although such amount was cut only after two or more trials, and after the seller had been notified of the failure of the machine to comply with the terms of the warranty: *Bayliss v. Hennessey*, 54 Iowa, 11.

Where a party to a contract prevents the implement of a condition thereto, the condition is to be held as fulfilled, and he liable in terms of the contract.

A. agreed to purchase a steam navy from B. under certain conditions, one of which was, that it should be capable of excavating a given quantity of specified substance in a certain time, on a "properly opened-up face," at a certain railway cutting. The machine was first tried at another cutting, where it failed to excavate the required amount, and on being subsequently removed to the original cutting, to a face which appeared on proof to be not a "properly opened-up" one, it was temporarily damaged a day or two after it began to work. A. thereupon refused to accept it, or to give it any further trial. Held (diss. Lord Deas), that though it was not clear from the evidence whether the machine could or could not have performed the work had such trial been given it, yet A., having prevented this condition of the contract from being implemented, was liable in the price of the machine as concluded for: *Dick v. Mackay*, 17 Scot. L. R., 565.

To prove that the representations of the vendor of a machine, as to its efficiency in certain particulars, were false, it is competent to show that other similar machines, made and sold by the same vendor, had upon trial been found defective in those particulars: *Water's Patent v. Smith*, 120 Mass., 444.

See 18 Eng. R., 231 note; 23 id., 816 note.

See *Eastman v. Premo*, 49 Verm., 355. Evidence that deceased was a man of

1880

Elphick v. Barnes.

careless business habits is inadmissible: *Gooddard v. Williamson*, 72 Mo., 131.

The plaintiff and defendants entered into an agreement, by which the former agreed to work for the latter for the term of one year for the sum of \$1,200, payable in equal weekly instalments, and the defendants agreed to pay therefor, "provided his work and services should be to their satisfaction. Should there be any disagreement the instalments are to be paid only to the time of such disagreement, unless an amicable settlement can be arranged."

Held, that the employment of the plaintiff was only to continue during the pleasure of the defendants, and that the latter might discharge him at any time without assigning any reason therefor: *Spring v. Ansonia Clock Co.*, 24 Hun, 175, 11 N. Y. Weekly Dig., 495.

Appellee entered into the service of the appellant under a written contract, providing, among other things in a rule of the company, which was made a part of the contract, that "any employe wishing in good faith to leave the company's service, may do so at any time without giving previous notice." Under the provisions of this rule, the right of appellee to quit appellant's employ before the expiration of his term of service is unquestioned. Language contained in another portion of the contract "that he would not stop work," etc., cannot, in the light of the whole contract, be so construed as to make it an entire contract.

The good faith of appellee in leaving the employ of the company is presumed until the contrary is shown, yet the motive which induced him to this action is a matter to be fairly submitted to the jury, and hence the question asked a witness, whether he knew of appellee's joining any strike or combination for the purpose of causing the company to pay him or other miners an advance in wages was proper, and an answer should have been allowed: *Wilmington Coal Mining and Manuf. Co. v. Barr*, 2 Bradw., 84.

In an action to recover payment for the construction of works, under a contract to execute them to the satisfaction of the employer, the plaintiff is not entitled to a verdict, unless the jury are satisfied not only that the contract, as

alleged, was entered into, and that the works were executed, but that the defendant, as a reasonable person, ought to have been satisfied with the way in which they were executed: *Smith v. Sadler*, 6 Vict. L. R. (Law), 5.

When a contract of guaranty depended upon the completion of certain work to the satisfaction of the surety; held, that evidence of facts raising a presumption of reasonable satisfaction was sufficient to launch the case against the defendant: *Sharp v. Turnbull*, 5 Vict. L. R. (Law), 103.

An agreement to pay a servant what the employer thinks he is worth, binds the latter to pay what the services are reasonably worth, and does not leave him to fix his wages at such sum as he sees fit after the services are performed, although such an agreement would be valid if understood: *Millar v. Cuddy*, 43 Mich., 273.

One who sells stolen goods received by him, though he act in good faith, is liable to the owner for their value: *Kramer v. Faulkner*, 9 Mo. App., 34.

A chattel mortgage, executed and recorded in the State where the property is situated, will, if valid under the laws of the place of execution, be enforced by the courts of the State into which the property is afterwards brought by the mortgagor, unless there is some statute to the contrary.

As a rule, personal property is governed by the law of the domicile of the owner, and not by the law of the *situs* of the property; but an assignment of personal property by way of mortgage is an exception to the rule, and the *lex situs*, and not the *lex domicilii*, governs chattel mortgages.

As to *lex domicilii*, see also 26 Eng. R., 12 note; 27 id., 743 note.

A chattel mortgage, executed and recorded in another State, on property within this State, the mortgage not having been recorded in this State, and there never having been a delivery of the property to the mortgagee, is invalid as against attaching creditors: *Ames, etc., v. Warren*, 76 Ind., 512.

Where the owner of certain cattle covered by a chattel mortgage shipped the same out of the State and sold them, and applied the proceeds to the payment of a note which he owed to a bank in another county of this State, the cashier to whom the payment was



made, supposing the money to be the proceeds of the sale of the cattle, but having no actual knowledge of the facts, and having no knowledge of the mortgage, which was not recorded in that county: Held, the bank could not be held to account to the holder of the mortgage for the amount received: *Burnett v. Gustafson*, 54 Iowa, 86.

The parties must assent to the same thing in the same sense, or they make no contract: 25 Eng. R., 570; *Ballard v. Trow's, etc.*, 1 City Cts. Rep., 188; *Fernd v. Whitehead*, 5 Victoria L. R. (Law), 132.

It is not only necessary that the minds of the contracting parties should meet on the subject-matter of the contract, but they must communicate that fact to each other, so that both may know that their minds do meet, and it is then only that the mutual assent necessary to a valid contract exists, and not until then that the contract is concluded: *Willis v. Turnley*, 4 Tex. L. J., 504.

At a sale by auction the auctioneer warranted certain flour to be first class Rochester flour; some of it was knocked down to the defendant, whose name was entered in the book by the auctioneer's clerk. A bought note was afterwards sent to the defendant describing the flour as "Rochester flour," but omitting "first class," together with a bill for acceptance for the price. Defendant, refusing to accept either the note or the acceptance, and declining to have the flour unless he was first allowed to have a sample to test: Held, that the defendant was not liable: *Pratt v. Rush*, 5 Vict. L. R. (Law), 421.

Though if both agree to substantially and essentially the same thing, the assent is sufficient: *Mackin v. Chicago*, 93 Ills., 105.

One who receives goods sent to him, knowing that the sender claims that the receiver has purchased them of him, cannot, in the absence of mistake or fraud, appropriate them to his own use, and then disclaim the purchase. The words "Terms Cash" upon an unreceipted bill of goods, sent by a

wholesale to a retail dealer, cannot be held, as matter of law, to imply that the goods were paid for before they were shipped; *Wellaner v. Fellows*, 48 Wisc., 105.

When the acceptance of an offer is absolute, the expression of a hope by the party so accepting it does not vary the contract: *Phillips v. Moor*, 71 Maine, 78.

If, through misunderstanding, they have not assented and agreed to the same thing, but one party, in consequence of a supposed agreement, has performed work for or delivered property to the other, the law rejects the understanding of each, and awards reasonable compensation: *Turner v. Webster*, 24 Kans., 38.

See *Mackin v. Chicago*, 93 Ills., 105.

The parties negotiated for the purchase by defendant, and sale by plaintiff, of certain premises; they agreed upon the price, and a contract was signed in duplicate, to which P. attached his name as a witness. While the papers lay upon the table in the possession of P., defendant inquired as to the papers in respect to the title; plaintiff replied that he had none; defendant then suggested that before proceeding further the matter should be submitted to his counsel for approval, which was assented to by plaintiff. The parties went to the office of that counsel, and he being absent, the papers, with defendant's check for the sum to be paid down, were left with a clerk, with directions to deliver them if the counsel approved; he did not approve, but rejected the title as defective. Before said counsel had given his opinion, plaintiff obtained one of the duplicates from the clerk and procured an acknowledgment thereof, on the oath of the subscribing witness. In an action for specific performance, held, that the facts justified a finding that no contract was concluded; that all the acts of the parties were to be regarded as parts of one transaction, which was never consummated, as there was to be no contract until delivery, and no delivery until approval: *Dietz v. Torish* 79 N. Y., 520,

1880

Chapleo v. Brunswick Benefit Building Society.

[5 Common Pleas Division, 327.]

March 17, 1880.

327]

\*HAMLYN V. BETTELEY.

*Bill of Sale—Statement of Consideration—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.*

The consideration for a bill of sale was stated to be "the sum of £182 3s. now paid by the grantee to the grantor." That sum was, at the request and with the assent of the grantor, in fact paid thus,—£8 3s. 3d. and £103 17s. 5d. to discharge two executions against the grantor's goods,—£25 0s. 9d. to a solicitor (who attested the execution of the bill of sale) for money lent and for costs due to him from the grantor,—and the balance, £45 1s. 7d., in cash to the grantor:

*Held*, in the absence of any suggestion of fraud, a sufficient setting forth of the consideration, within 41 & 42 Vict. c. 31, s. 8.

[5 Common Pleas Division, 331.]

April 24, 1880.

331] \*CHAPLEO and Wife v. BRUNSWICK BENEFIT  
BUILDING SOCIETY and Others.

*Building Society—Unincorporated—Certified Rules—Borrowing in excess of prescribed Limit—Agent—Authority—"Holding out" by Society and Directors—Liability.*

By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary who was also acting treasurer; the usual course of business was that he delivered to the lenders a receipt and undertaking on behalf of the directors to give promissory notes signed by the directors, and subsequently exchanged such notes for the receipt and undertaking. After a total amount had been borrowed exceeding that limited by the rules, the plaintiffs paid a sum to the secretary as a loan to the society, and received from him the usual receipt and undertaking, but no promissory notes. This sum he appropriated to his own use. In an action against the society and directors the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the directors did the same:

*Held*, by Lord Coleridge, C.J., that although money had been borrowed in excess of the total amount limited by the rules, and they might therefore afford protection to the society or its members as between themselves and the directors, yet that the society and directors having for a purpose legal in itself authorized the loan made by the plaintiffs were both liable to them.

**FURTHER CONSIDERATION.** The proceedings, facts, and arguments are sufficiently stated in the judgment.

*C. Russell*, Q.C., *Taylor*, and *C. A. Russell*, for the plaintiffs.

*Heywood (Herschell)*, Q.C., with him, for the defendant society.

*Pope*, Q.C., and *Crompton*, for the defendant directors.

April 24. LORD COLERIDGE, C.J.: This case was tried before me and a special jury at Manchester in February last; certain points arising on the findings of the jury were argued before me at Westminster on the 13th and 20th of March, and I now proceed to give judgment.

The action was brought against the Brunswick Building Society, and the directors of the society, to recover a considerable sum of money lent by the plaintiffs to the society under circumstances which I will presently detail. The whole of the sum in dispute \*with interest has been [332 paid by the defendants except a sum of £100. But, as the defence to this sum of £100 is one upon the validity or invalidity of which the liability to pay many thousands of pounds depends, it is thought worth while, and no doubt is worth while, to resist payment of it. The defendant society was established in January, 1871. Its rules were certified pursuant to the act then in force, in March, 1871; and certain amendments to the rules were certified in March, 1873. Its object is defined by the first rule which is as follows:

"1. This society shall be denominated the 'Brunswick Permanent Benefit Building Society.' Its object is to enable its members to receive the amount or value of a share or shares to purchase or erect freehold or leasehold property. Payments to be made fortnightly in such sums as are hereinafter specified and defined; each share to be of the value of £10. Members may subscribe for any number of shares."

The 6th rule prescribes that the directors shall at any meeting elect a treasurer from amongst themselves and the other members at such remuneration as may be deemed proper.

The 10th rule is this: "Messrs. Keighley Lea, Son & Co. shall be the secretaries to the society."

The 12th rule, upon which much of the argument before me turned, is as follows:

"The directors may at any time as may be necessary for the purposes of the society borrow money at interest from any banker with whom the funds of the society shall be deposited, or from any other source, to procure which the directors may give such security as they may think proper, but the total amount of money to be so borrowed shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society."

It is admitted that when the £100 in dispute in this action was paid by the plaintiffs, the total amount of money borrowed by the society exceeded (in fact it very largely exceeded) the amount secured by mortgage within the terms

1880

Chapleo v. Brunswick Benefit Building Society.

of this 12th rule. The question is whether the society and the directors of the society are nevertheless liable to repay it under the circumstances which I now proceed to state.

333] \*The money was not paid to the society itself assembled at a general meeting, nor even to one or more of the directors at any board meeting. It was paid to a Mr. Keighley Lea, and his connection with the society and with the directors was this. His firm were made secretaries by the 10th rule. They kept all the business and cash books belonging to the society. One of them attended the meetings of the directors, and kept the minutes. Mr. George Lea had been treasurer, and after his death Keighley Lea acted as treasurer, and received all the money paid to the society, and if he was not treasurer there was none. A question was made as to the exact meaning of certain minutes referring to the appointment of treasurer, a question which, after the statement of fact just made and made in the uncontradicted words of one of the witnesses, I do not think it material to discuss. The office of Keighley Lea was the only office of the defendant society; there only the society met whenever it did meet; there only the meetings (generally once a fortnight) of the directors were held. Keighley Lea was, as one of the directors who was a witness at the trial called him, "the factotum of the society." The society borrowed money largely; and the mode in which the borrowing was conducted was, without any exception, from the very beginning of the society, the mode pursued in this case. The lender brought the money to Keighley Lea; a receipt and an undertaking on behalf of the directors to give a promissory note of the directors was given him in the form used in this case on behalf of the society and the directors either by Keighley Lea or by one of his clerks; promissory notes for the amount of the sum lent were then signed by the directors at their next meeting, and exchanged for the receipt and undertaking through Keighley Lea; and on the sums so borrowed and so secured interest was paid. Except as to the £100 now in dispute, this course was followed with respect to the plaintiffs; all the sums lent to the society were secured by the promissory notes of the directors, and these notes have been paid. In the case of this £100 the money was received, and the receipt and undertaking was given, but no promissory note was ever procured. The money was paid to Keighley Lea on the 29th of October, 1878; and in December, 1878, or in January, 1879, Keighley Lea absconded, a large sum 334] \*of money belonging to the society, and paid to him, having never been paid over to them by him. On applica-

tion to the directors by the plaintiffs they refused either to pay interest on the £100, or to give their promissory note for it; they repudiated all liability for themselves or for the society; and the question is are either or both liable?

At the trial the evidence was substantially all one way, and I left two questions to the jury. 1. Did the defendant society hold out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms on which it was received? 2. Did the defendant directors?

The jury answered both questions in the affirmative, and if they could so find in point of law I am of opinion that there was abundant evidence to warrant them so finding in point of fact. It is said, however, that they could not, and this has now to be considered.

The case is not quite the same as it affects the society and as it affects the directors, and I will deal with the liability of each separately, and first as to the society itself.

It is true that though it has been incorporated under the provisions of 37 & 38 Vict. c. 42, it had not been so incorporated and was not a corporation at the time of the lending of this £100. But the society as a body, just as any other copartnership as a body, might know, and so act upon their knowledge as to sanction the proceedings of Keighley Lea. Of this knowledge, and of their so acting upon it, there has been abundant evidence given against the society. If it was not so in point of fact it might have been denied. If the members of the society or any of them were really ignorant of what Keighley Lea was habitually doing, and if knowing it they did not sanction it, they might have been called to say so. No one was called to say so, probably for the best reason, that no one could be. The case comes, therefore, under a well-settled principle. The society have put their agent in his place to do the very acts for them which he did, and they must be answerable for the manner in which he has conducted himself in doing those acts. If authority be necessary for this proposition, it is to be found in *Barwick v. English Joint Stock Bank* (\*) and *Mackay v. Commercial Bank of New Brunswick* (\*).

\*The dicta of Lord Cranworth and Lord Chelmsford in the case of *Western Bank of Scotland v. Addie* (\*), which have been supposed to conflict with these cases are clearly explained and reconciled by Sir Montague Smith, at p. 413 of the report of that case in the Privy Council.

It has been argued that in order to ascertain whether the

(<sup>1</sup>) Law Rep., 2 Ex., 259.

(<sup>2</sup>) Law Rep., 5 P. C., 394.

(<sup>3</sup>) Law Rep., 1 H. L., Sc. 145.

1880

Chapleo v. Brunswick Benefit Building Society.

society have put their agent in his place to do for them the acts he did, the constitution of the society itself must be borne in mind. I make no doubt at all that this is true, and if it should turn out that the society could not authorize an agent to do the act, because it was an act they could not do themselves, they would not be liable for what he did. The argument addressed to me on this point was as follows: This is a society which exists only for certain purposes; it does not exist for the purpose of borrowing beyond the limit ascertained by the 12th rule; it could not itself borrow; it could not ratify the acts of its directors in so borrowing; any such borrowing therefore by an agent, as there was in this case, cannot be authorized in point of fact, because there is no power to authorize it in point of law, and the judgment of the House of Lords in *Riche v. Ashbury Railway Carriage and Iron Co.* (1) was cited as establishing conclusively the proposition contended for. I think it establishes nothing of the kind. The company in that case was an incorporated company, with a memorandum and articles of association. The contract on which the action against the company was brought was a contract which in the opinion of all the judges (they differed upon other points, but agreed on this) was inconsistent with the memorandum of association; and on this ground the House of Lords decided the case. But in the case before us there is no memorandum and no articles of association, and if it be said, as with some reason it may be, that the first rule is analogous to the memorandum, and the remaining rules to the articles, then there is the authority of *Laing v. Reed* (2) to show that the existence in such a society as this of such a rule as rule 12 is neither illegal in itself, nor inconsistent with a rule exactly like rule 1 in the present case. I may 336] \*observe in passing that the authority of *Laing v. Reed* (2) is expressly recognized and in no way diminished by the later case of *In re National Permanent Benefit Building Society, Ex parte Williamson* (3). These cases it is true establish only that such a society as this may borrow; they do not ascertain that if it borrows beyond the limit prescribed by the rules it may nevertheless be liable. But both were cases in which the point did not and could not arise: for they were cases in which the plaintiffs were themselves members of the company; and it may well be as between members of the company and the directors, such a rule as rule 12 may in certain circumstances protect the

(1) Law Rep., 7 H. L., 653; 14 Eng. R., 42

(2) Law Rep., 5 Ch. App., 4.

(3) Law Rep., 5 Ch. App., 309.

company or certain members of it. But this case is not like those, rule 12 applies in terms to the directors only. In this case the society, for a purpose in itself legal, have authorized Keighley Lea to take the £100 for them from the plaintiffs. I am of opinion they are liable to repay it.

So much as to the society. As to the directors it seems to me quite plain that they might if they pleased hold out Keighley Lea to the plaintiffs as authorized to undertake for them that they would give their promissory note on the receipt of money paid as this £100 was paid. It seems to me equally plain that there is overwhelming evidence, quite uncontradicted, that they did in fact so hold him out. It follows, I think, that they are bound by his undertaking; and that they must either give their promissory note, or, in the events which have happened, pay the money. Indeed, if the action had been against them alone, their very able counsel felt that unless he could get rid of the verdict, he could not resist this consequence. But he contended that as the action had been brought against the society as well as the directors the claims were inconsistent, and that if I held the society liable I could not at the same time hold the directors liable. The claims do not seem to me, however, to be inconsistent. I have said that I think the society might and did hold out Keighley Lea as having authority to do what he did, and to receive the money for them. I also think that the directors might well, and did in fact, hold him out as having authority from them \*to under- [337 take for them, that they should give their promissory note. He did undertake for them, and they are bound by his undertaking.

I therefore give judgment for the plaintiffs against both sets of defendants and with costs.

*Judgment for plaintiffs.*

Solicitors for plaintiffs: *Cobbett & Co.*

Solicitors for defendant society: *Heywood & Son.*

Solicitors for defendant directors: *Salé & Co.*

See *ante*, 87 note.

A city which has by local statute the right to make a subscription in aid of a railroad cannot, when its officers have issued its bonds containing no notice in their recitals of any condition, set up, as against a *bona fide* holder, that the bonds are void for non-compliance with certain conditions, even though the statute authorizing their issue ex-

pressly provides that they shall not be valid until such conditions are complied with: *American, etc., v. Bruce*, 4 Morr. Trans., 664, distinguishing *Kohn v. Eagle*, 84 Ills., 292.

But see *Board of Chosen Freeholders v. Merchants Exchange National Bank*, Daily Register, July 12, 1882, p. 1, Wallace, U. S. Cir. J.

[5 Common Pleas Division, 337.]

Feb. 27, 1880.

## SMITH V. MORGAN.

*Executor—Administration—Assets of deceased Person—Priority of Judgment Creditor.*

The priority which a judgment creditor is entitled to in the administration of the assets of a deceased person under a decree in an administration suit, is not affected by s. 10 of the Judicature Act, 1875, whether such judgment be registered or not.

ON the 6th of November, 1876, one Thomas obtained a judgment for £38 14s. against the defendant as executor of Rees Morgan, deceased, for a debt due from the testator. This judgment was not registered, nor had execution been issued thereon, the testator's assets being in the hands of a receiver appointed by the county court of Glamorganshire on the 15th of November, 1876, in a suit for the administration of the assets of Morgan under the direction of that court; and on the 12th of December a decree for administration was made.

On the 22d of July, 1879, the judge of the county court, upon the application of Thomas, made an order declaring him to be entitled to the £38 14s., and directing that sum to be paid to him out of the fund in court.

A rule having been obtained calling upon the plaintiff to show cause why the order should not be set aside, on the ground that Thomas was not a "secured creditor" and had no priority.

*Finlay* showed cause: A judgment creditor has priority in the administration of the assets of a deceased person, 338] even though his judgment is not registered: *Jennings v. Rigby* ('); *Williams v. Williams* ('). That right was not affected by 32 & 33 Vict. c. 46; neither is it by the 10th section of the Judicature Act, 1875 (38 & 39 Vict. c. 77), which, in substitution for subs. 1 of s. 25 of the act of 1873 (36 & 37 Vict. c. 66), enacts that "in the administration by the court of the assets of any person who may die after the commencement of this act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bank-

(') 33 Beav., 198.

(\*) Law Rep., 15 Eq., 270; 5 Eng. R., 844.



rupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, may come in under the decree or order for the administration of such estate, and make such claims against the same as they may respectively be entitled to by virtue of this act." A judgment creditor is not a secured creditor. The court called on

*Aspinall*, to support the rule: The effect of s. 10 of the Judicature Act, 1875, is to do away with the priority of judgment and secured creditors in the administration of a testator's or an intestate's estate: *Ex parte Joselyne, In re Watt* (1); *In re Stanhope Silkstone Collieries Co.* (2).

LINDLEY, J.: I am of opinion that the county court judge was right in holding that Thomas, the judgment creditor, had priority in the administration of the assets of the testator. The doubt created by the 32 & 33 Vict. c. 46, was disposed of by the case of *Williams v. Williams* (3). And s. 10 of the Judicature Act, 1875, does not apply to judgment debts.

*Rule discharged.*

Solicitors for plaintiff: *Hacon & Turner.*

Solicitors for defendant: *Ullithorne, Currey & Co.,* for Simons & Plews, Merthyr Tydfil.

(1) 8 Ch. D., 327; 25 Eng. R., 322.

(2) 11 Ch. D., 160; 27 Eng. R., 427.

(3) Law Rep., 15 Eq., 270; 5 Eng. R., 844.

See *ante*, 258; McClellan's Surr. Pr., 481 *et seq.*

The statute providing for priority of payment of a judgment does not apply to a judgment not perfected previous to the death of the testator: *Monal v. Mitchell*, 81 N. Y., 356, 361, 19 Abb., 1.

See *Brown v. Nichols*, 9 Abb. Pr. (N.S.), 1, 26; 42 N. Y., 26, 30-5; *Bernes v. Weisser*, 2 Bradf., 212; *Clark's Case*, 15 Abb. Pr., 229.

Nor to judgments rendered before a justice of the peace. They are not courts of record: *Sherwood v. Johnson*, 1 Wend., 443; *Stevenson v. Weisser*, 1 Bradf., 343.

Nor, it seems, to partnership debts:

*Kirby v. Carpenter*, 7 Barb., 379-380; *Payns v. Matthews*, 6 Paige, 19; *Sellis's Case*, 4 Abb. Prac., 272, 4 Bradf., 213.

As to joint debtors, see *Hammond v. Hoffman*, 2 Redf. Surr. R., 92.

It does not apply to judgments recovered in another State: *Brown v. Public Admr.*, 2 Bradf., 103.

Nor to federal judgments: *Bernes v. Weisser*, 2 Bradf., 212.

As to taxes assessed after death of the testator, see *Harrison v. Peck*, 56 Barb., 251, 265.

As to rents: *Dennistown v. Hubbell*, 10 Bosw., 164.

[5 Common Pleas Division, 339.]

Feb. 28, 1880.

**339] \*BENNETT V. LORD BURY and Others.**

*Practice—Stay of Proceedings at the Instance of the Plaintiffs in several Actions until one tried as a Test Action—Order XXIX, r. 1.*

Thirty-eight actions having been brought by different persons against the defendants as directors of an incorporated company, charging misappropriation of moneys advanced by the plaintiffs in different amounts and at different times, but all under similar circumstances:

*Held*, upon the authority of *Amos v. Chadwick* (4 Ch. D., 869, and 9 Ch. D., 459; 26 Eng. R., 243), that it was competent to a judge at chambers, upon the application of the plaintiffs, to stay the proceedings in thirty-seven of the actions until after the trial of the thirty-eighth as a test action,—proper provision being made in case that action did not satisfactorily dispose of the question in all.

THIRTY-EIGHT actions were brought by as many different plaintiffs against the defendants who were directors of a company called "The Colonial Trusts Corporation, Limited," in respect of various sums deposited with them for investment. The writ in each case was indorsed for a sum received by the defendants for the purpose of investment.

In one of the actions, *Hull v. Lord Bury and Others*, a statement of claim had been delivered, which amongst other things alleged that the defendants were directors of the company, a limited company incorporated under the Companies Act, 1862 (32 & 33 Vict. c. 89), for the purpose *inter alia* of the investment of moneys on account of and as trustees for persons desirous of investing money through their agency; that during and since the year 1859 the corporation received from the plaintiff sums for investment upon his account, and upon the terms that the moneys so invested which should be repaid to the corporation should be invested on similar securities or accounted for and paid to the plaintiff; that the moneys were invested by the corporation on account of the plaintiff, and that out of the said moneys or the moneys received by the corporation in repayment of the investments or some of them, the corporation as the agents and trustees of the plaintiff during the years therein specified advanced moneys amounting to £8,040 on mortgage of certain lands specified in several mortgage deeds, the particulars of each 340] of which was set forth; that, in the case of several of these mortgages, the defendants applied to the mortgagors for repayment of the principal sums, and obtained the same upon the faith of their representations that they were the agents of the plaintiff to receive such moneys on

his account, and in the belief on the part of the mortgagors that they the defendants had the plaintiff's authority to receive such payment. It then went on to negative the defendant's authority to receive such payments, and alleged that having obtained the said moneys the defendants concealed that fact from the plaintiff and retained and appropriated the said moneys to their own use, and permitted them to be employed for the purposes of private trade and speculation without the knowledge or sanction of the plaintiff.

On the 5th of February, 1880, Field, J., on the application of the plaintiffs in thirty-seven of the actions, made an order that all further proceedings in this action and in the thirty-six other actions should be stayed until after the trial of the action of *Hull v. Lord Bury and Others*; and the order proceeded as follows: "And I further order that the time for delivering the statements of claim shall be enlarged until after judgment shall have been given in the action of *Hull v. Lord Bury and Others*, the plaintiffs in all the actions respectively undertaking that the action of *Hull v. Lord Bury and Others* be treated as a test action and decisive of their respective rights, unless it should appear to the court that the said test action had failed to be a real trial of the matter in issue therein, in which case the plaintiffs undertake to be bound by any order that the court may think fit to make: the defendants to be at liberty to require the plaintiffs to proceed with their respective actions, if dissatisfied with the result of the test action: the plaintiffs respectively to deliver within ten days particulars of their claims and of the mode in which the amounts sought to be recovered are alleged to have been employed by the defendants; the defendants to be at liberty to apply for an order that any of the said actions shall be forthwith proceeded with, upon satisfying the court or a judge that there is a special ground of defence not raised in the test action."

Lord Bury and Mr. Montgomerie, two of the defendants in all the actions, moved to rescind this order.

\**Herschell, Q.C.*, and *Reginald Brown*, for Mont. [341] gomerie, submitted that such an order could only be properly made at the instance of a defendant, and that the only instance in which it had been made on the motion of the plaintiffs was a case in equity, viz., the case of *Amos v. Chadwick* (<sup>1</sup>), the circumstances of which were altogether different from those of the cases before the court, inasmuch as there the cause of action of each of the plaintiffs was identically the same, whereas here no two of the actions would

(<sup>1</sup>) 4 Ch. D., 869; 9 Ch. D., 459; 26 Eng. R., 243.

turn upon the same facts. No one of the actions can properly be called a test action.

[LORD COLERIDGE, C.J.: That is provided for by the order: the other defendants are not bound by the result of the test action.]

*Lumley Smith*, for Lord Bury, submitted that at all events all the actions ought to be allowed to go on until the pleadings were complete, when a fair order might be made.

*Butt*, Q. C., and *J. C. Mathew*, *contra*, were not called upon.

LORD COLERIDGE, C.J.: I am of opinion that the order of my Brother Field was correct and ought to be affirmed. This is an application on the part of certain defendants to rescind an order to stay the proceedings in thirty-seven actions against them until after the trial of the thirty-eighth, under these circumstances: The thirty-eight plaintiffs had under varying circumstances deposited moneys for investment by a corporation of which the defendants are directors, in colonial or other securities; and the charge against them in substance is that they, being directors of the corporation, have received from the depositors various sums of money for investment, and, having in the first instance invested such moneys on mortgages, and having received them back from the mortgagors, have applied them in part to their own use, and as to other part have appropriated them to purposes other than the legitimate purposes of the corporation, without the assent of the plaintiffs. It is true the incidents will or may vary in each case, and that there will be differences of proof in each: but the gist of the charge is the same in all; the fraud charged in each of the thirty-eight actions is 342] identically the same, viz., the \*wrongful appropriation of the moneys of the plaintiffs to purposes unauthorized by them. The order of my Brother Field was that the proceedings in the action of *Bennett v. Bury* and in all the other thirty-six actions should be stayed until after the trial of *Hull v. Bury* the plaintiffs in those several actions undertaking that *Hull v. Bury* should be treated as a test action and decisive of their respective rights; unless it should appear to the court that the trial of that action had failed to be a real trial of the matter in issue therein, in which case the plaintiffs undertook to be bound by any order that the court might think fit to make; and further that the defendants were to be at liberty to apply for an order that any of the actions shall be forthwith proceeded with, upon satisfying the court or a judge that there is a special ground of defence not raised in the test action. That would be quite

right: *Hull v. Bury* might prove not to be a test action; therefore my Brother Field's order very properly provides for that contingency. Two objections were urged against this order. First, that it is an entirely novel proceeding,—at attempt by plaintiffs to consolidate, and not by defendants. That objection, I think, is answered by the case of *Amos v. Chadwick* (<sup>1</sup>). There, seventy-eight actions were brought by different plaintiffs against the same defendants in respect of an alleged misrepresentation in the prospectus of a company; and Malins, V.C., upon the application of the plaintiffs, ordered that one of the actions should be tried as a representative action, and that the proceedings in the others should be stayed, the plaintiffs in all the other actions undertaking to abide by such order as the court might think fit to make on the determination of the representative action; and the Court of Appeal, consisting of Jessel, M.R., and Lords Justices Brett and Cotton, held that the questions in all the actions being substantially the same, if all were tried, the order was well made under the general power of the court to prevent a scandal in the administration of justice. It is plain, therefore, that my Brother Field had power to make the order which was made in the present case; and, if ever there was a case for the exercise of such a discretionary power, this is that case. The order provides for every difficulty which could arise.

\*Then Mr. Herschell contends that the defendants [343 have a right to have all the actions proceeded with, or dismissed for want of prosecution. But it seems to me that Order XXIX meets this very case. The 1st rule of that Order provides that “if the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may at the expiration of that time apply to the court or a judge to dismiss the action with costs, for want of prosecution; and, on the hearing of such application, the court or judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as to the court or judge shall seem just.” What judge would dismiss for want of prosecution thirty-seven actions when the proceedings in one, the determination of which will in all probability dispose of the whole question, are honestly being proceeded with to be tried to the end? I cannot conceive that any such order would be made. If so, there is an end of the only argument in Mr. Herschell's favor. The only way the order hurts him is the saving of

(<sup>1</sup>) 4 Ch. D., 869; 9 Ch. D., 459; 26 Eng. R., 243.

1880

Bennett v. Lord Bury.

the running of the Statute of Limitations. Upon the reason of the thing, therefore, as well as upon the authority of *Amos v. Chadwick* <sup>(1)</sup>, I think the order of my Brother Field is right and should be affirmed. The only doubt I have entertained is whether the several actions should not be allowed to go on as far as the delivery of the statement of claim; but that difficulty is removed by the provision in the order for giving in each case the particulars of the claims in each action as well as of the mode in which the amounts sought to be recovered are alleged to have been employed by the defendants. The order therefore provides for everything the defendants can reasonably require; and the appeal must be dismissed with costs.

LINDLEY, J.: I am of the same opinion. The first thing that strikes one is this, whether or not there has been on the part of the plaintiffs an abuse of the process of the court by bringing several actions simultaneously in respect of a matter which is more or less common to all the plaintiffs. If that were the case, one would know how to deal with it. The obvious reasons, however, for bringing several actions, [344] are, the one, to save any question as to the Statute of Limitations, and the other to obviate an equally nice question as to whether an action by one on behalf of himself and others would lie under the circumstances of this case. I must confess I do not see how the defendants can be hurt by this order. It is true it has the effect of keeping several actions hanging over their heads. The only way of preventing that has been suggested by my Lord. On the other hand, the order prevents the defendants from being subjected to the unnecessary burden of the costs of thirty-eight actions, when the whole matter in controversy may be settled in one. As to our power to do what is done by this order, if authority were needed, *Amos v. Chadwick* <sup>(1)</sup> supplies it. I must confess I should have thought without that case that there was abundant power to make such an order. It comes therefore to a question of discretion; and I think my Brother Field has properly exercised his discretion in what he has done.

*Appeal dismissed.*

Solicitors for plaintiff: *Markby & Stewart.*

Solicitors for defendants: *White, Borrell & White, and Linklater & Co.*

<sup>(1)</sup> 4 Ch. D., 869; 9 Ch. D., 459; 26 Eng. R., 243.

[5 Common Pleas Division, 344.]

March 6, 1880.

## BYRNE &amp; CO. V. LEON VAN TIENHOVEN &amp; CO.

*Contract—Sale of Goods—Offer—Acceptance—Withdrawal of Offer—Letter posted before but received after Acceptance.*

An offer of a contract sent by letter cannot be withdrawn by merely posting a subsequent letter which does not, in the ordinary course of the post, arrive until after the first letter has been received and answered.

By letter of the 1st of October the defendants wrote from Cardiff offering goods for sale to the plaintiffs at New York. The plaintiffs received the offer on the 11th and accepted it by telegram on the same day, and by letter on the 15th. On the 18th of October the defendants posted to the plaintiffs a letter withdrawing the offer. This letter reached the plaintiffs on the 20th :

*Held*, by Lindley, J., that the withdrawal was inoperative, a complete contract binding both parties having been entered into on the 11th of October when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose was withdrawn.

ACTION tried at Cardiff Assizes, before Lindley, J., without a jury.

\**B. T. Williams* and *B. Francis Williams*, for the [345 plaintiffs.

*M'Intyre*, Q.C., and *Hughes*, for the defendants.

*Cur. adv. vult.*

March 6. LINDLEY, J.: This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1,000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury; and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be £375.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on the 1st of October, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on the 11th and 15th of October respectively. These letters and telegram were as follows: [The learned judge read the letter of the 1st of October, 1879, from the defendants to the plaintiffs. It contained a reference to the price of tinplates branded "Hensol," and the "offer of 1,000 boxes of this brand 14 × 20 at 15s. 6d. per box f. o. b. here with 1 per cent. for our commission; terms, four months' bankers' acceptance on London or Liverpool against shipping documents, but subject to your cable on

1880

Byrne v. Van Tienhoven.

or before the 15th inst. here." The answer was a telegram from the plaintiffs to the defendants sent on the 11th of October, 1879: "Accept thousand Hensols." On the 15th of October, 1879, the plaintiffs wrote to the defendants: "We have to thank you for your valued letter under date 1st inst., which we had on Saturday P.M., and immediately cabled acceptance of the 1,000 boxes 'Hensol,' 1c. 14/20 as offered. Against this transaction we have pleasure in handing you herewith the Canadian Bank of Commerce letter of credit No. 78, October 13th, on Messrs. A. R. McMaster & Brothers, London, for £1,000. . . . Will thank you to ship the 1,000 'Hensols' without delay." These letters and telegram would, if they stood alone, plainly constitute a contract binding on both parties. The defendants in their 346] pleadings say that there \*was no sufficient writing within the Statute of Frauds, and that they contracted only as agents; but these contentions were very properly abandoned as untenable, and do not require further notice. The defendants, however, raise two other defences to the action which remain to be considered. First, they say that the offer made by their letter of the 1st of October was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to these are as follows: On the 8th of October the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. The material part of this letter was as follows: "Confirming our respects of the 1st inst. we hasten to inform you that there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about twenty-five per cent. we are reluctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1,000 boxes 'Hensols' at 17s. 6d. to be cancelled from this date." This letter of the 8th of October reached the plaintiffs on the 20th of October. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. [The learned judge read the letter. In it the plaintiffs expressed astonishment at the contents of the letter of the 8th, recapitulated the transactions, and said "practically and in fact a contract for 1,000 boxes came into existence between you and ourselves. It requires the consent of both parties to a contract to cancel the same. If instead of writing to us on the 8th you had cabled 'offer withdrawn,' you would have protected yourselves and us too. We disposed of the



1,000 boxes on the 17th at a net profit of 1,850 dollars. . . . We write our friend Philip S. Philips, Esq., of Aberkillery, requesting him to call on you and demand delivery as agreed." In a postscript they added, "You speak of offer of 1,000 boxes Hensol at 17s. 6d. The only firm offer we received from you under date 1st of October was 1,000 boxes at 15s. 6d., and ten per cent. f. o. b. Cardiff; we cable you to-night 'demand shipment.' ""] This letter is followed by one from the defendants to the plaintiffs of the 25th of October refusing to complete. [The learned judge read it. The defendants acknowledged the receipt \*of the cable [347 message of the 20th, inclosed the credit note sent in the letter of the 15th, and added, "Our offer having been withdrawn by our letter of the 8th inst. we now return the above credit, for which we have no further need, but take this opportunity to observe that in case of any future business proposals between us, we must request you to conform to our rules and principles, which require bankers' credit in this country, whereas the firm of A. R. McMaster & Brothers are not classified as such.""]

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not: *Routledge v. Grant* <sup>(1)</sup>. For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States: see *Taylor v. Merchants Fire Insurance Co.* <sup>(2)</sup> cited in Benjamin on Sales, pp. 56-58, and it is adopted by Mr. Benjamin. The same

<sup>(1)</sup> 4 Bing., 653.

<sup>(2)</sup> 9 How. (U.S.) Rep., 390.

1880

Byrne v. Van Tienhoven.

view is taken by Mr. Pollock in his excellent work on Principles of Contract, ed. ii, p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, viz., 348] \*whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, *Harris' Case* (1); *Dunlop v. Higgins* (2), even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the postoffice his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter with-

(1) Law Rep., 7 Ch., 587; 3 Eng. Rep., 529.

(2) 1 H. L., 381.

drawing the offer had not been posted before his acceptance of it. It appears to me that both legal \*principles, [349 and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

The defendants' next defence is that, as the plaintiffs never sent a banker's acceptance on London or Liverpool as stipulated in the contract, they cannot maintain any action for its breach. The correspondence which preceded the contract satisfies me that the defendants attached importance to this particular mode of payment; and although the plaintiffs sent letters of credit which were practically as good as a banker's acceptance, yet I cannot say that they did in fact send a banker's acceptance according to the contract.

By the terms of the contract bankers' acceptances on London or Liverpool were to be sent against,—i.e., were to be exchanged for—shipping documents; and if the defendants had been ready and willing to perform the contract on their part on receiving proper bankers' acceptances, I should have been of opinion that the plaintiffs would not have sustained this action. But it is perfectly manifest from the correspondence that the defendants did not refuse to perform the contract on any such ground as this. It is true that the defendants in their letter of the 31st of October, say that, "even if we had not withdrawn our offer we would all the same have returned your credit," and the defendants' solicitors in their letter of the 26th of November, say that, "if your clients (i.e., the plaintiffs), had fulfilled the terms of the contract at the outset the goods were ready to be shipped;" but the defendants' own letters of the 8th, 13th, and 25th of October, show conclusively that this was not the case and that the defendants stood on their notice of withdrawal and would not have performed the contract even if bankers' acceptances had been sent. Their letter of the 25th of October in which they return the plaintiffs' first letter of credit is explicit on this point. The defendants do not return the letter of credit because it is not a banker's acceptance, but because the offer was withdrawn; and the inference I draw from that letter is that if the offer had not been withdrawn the defendants would not have returned the letter of credit although in future transactions they might have been more \*particular. In face of this refusal, [350 it was useless for the plaintiffs to send a bankers' accept-

1880

Byrne v. Van Tienhoven.

ance, and although when they found their first letter of credit returned they sent another which was declined, still the defendants never receded from their first position, or expressed any readiness to ship the goods on receiving a banker's acceptance; and it is plain to my mind that they were not prepared to do so. On the other hand, I am satisfied that if the defendants had taken this ground the plaintiffs would have sent bankers' acceptances in exchange for shipping documents, and I infer as a fact that the plaintiffs always were ready and willing to perform the contract on their part, although they did not in fact tender proper bankers' acceptances. It was contended that by pressing the defendants to perform their contract the plaintiffs treated it as still subsisting and could not treat the defendants as having broken it, and a passage in Mr. Benjamin's book on Sales, p. 454, was referred to in support of this contention. But, when the plaintiffs found that the defendants were inflexible, and would not perform the contract at all, they had, in my opinion, a right to treat it as at an end and to bring an action for its breach. It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. The authorities referred to by Mr. Benjamin (viz., *Avery v. Bowden* <sup>(1)</sup> and others of that class), show that as the plaintiffs did not when the defendants first refused to perform the contract, treat that refusal as a breach, the plaintiffs cannot now treat the contract as broken at the time of such refusal. But I have found no authority to show that a continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as a breach of it by the defendants. On the contrary *Ripley v. McClure* <sup>(2)</sup>, and *Cort v. Ambergate, &c., Ry. Co.* <sup>(3)</sup> show that the continued refusal by the defendants operated as a continued waiver of a tender of bankers' acceptances and enable the plaintiffs to sustain this action. In the present instance it is not necessary to determine exactly when the contract can be treated by the plaintiffs as 351] broken by the defendants. It is sufficient to say that whilst the plaintiffs were always ready and willing to perform the contract on their part the defendants wrongfully and persistently refused to perform the contract on their part; and before action there was a breach by the defendants not waived by the plaintiffs. For the reasons above stated I give judgment for the plaintiffs for £375 and costs.

*Judgment for plaintiffs.*

(1) 5 E. & B., 714.

(2) 4 Ex., 345.

(3) 17 Q. B., 127.

Solicitors for plaintiffs: *Robinson, Preston & Stow*, for Colborne & Ward, Newport, Monmouthshire.

Solicitors for defendants: *Ingledew & Ince*, for Ingledew, Ince & Vachell, Cardiff.

See 29 Eng. R., 347 note; 16 Western Jurist, 337.

While the rule which permits a letter to be admitted in evidence against a party where there is no other proof of the handwriting, except the fact that in due course it had been received in reply to a letter which had been addressed to the same party, may apply to a dispatch in answer to a communication by letter, it is inappropriate to a dispatch received in reply to a communication received by telegraph.

A telegraphic dispatch is a sufficient compliance with the statute of frauds, in its requirement that a promise to guarantee the debt of another should be in writing: *Smith v. Easton*, 54 Md., 138.

Where a proposition is in writing, and the acceptance is *verbal*, the contract is an oral contract.

Where one party made a proposition by letter, and the other party wrote to a third party to endeavor to procure better terms, and, if he could not, accept the offer; held, a mere *verbal* acceptance: *Hulbert v. Atherton*, 12 Northwestern Repr., 780, Sup. Ct., Iowa.

Where an acceptance of an offer is said to have been sent by post, it is not sufficient proof to bind the offeror that the acceptance is proved to have been posted, without proof that it reaches him: *Mason v. Benhar Coal Co.*, 19 Scot. Law Repr., 642.

Where it was alleged that a contract for exchange of property had been consummated by correspondence, and it appeared that the final letter of complainant, in which he claims to have accepted the proposition of respondent, contained a condition to which respondent never assented; held, that there was no consummated contract; that, though the condition might have been of small importance, yet the respondent had a right to an unconditional acceptance of his proposition before being bound: *Merriam v. Lapsley*, 2 McCrary, 606.

In the construction of a contract by letters it is not necessary that there

should be an express assent, but the requisite assent may be collected by implication from the whole terms of the correspondence. In reply to an offer by the defendants for the sale of certain wheat, the plaintiffs telegraphed: "Will take your five cars at 85 cents per bushel;" to which the defendant replied by postal card on the 25th of July: "Send instructions for the shipment of the five cars spring." On the 26th the plaintiff mailed a postal card with instructions, but this was never received by the defendants. A shipping note mailed on the 27th, however, reached the defendant on Monday the 29th, but he had sold the wheat on the 27th.

Held, affirming the judgment of the county court, that the postal card sent by the defendant on the 25th of July amounted to an absolute acceptance, and not merely a conditional acceptance, should the defendant be satisfied with the instructions he might receive as to the mode of shipment.

Held, also, that even if the plaintiff did not send instructions till the 27th, the delay would not have enabled the defendant to treat the contract as cancelled: *Bruce v. Tolton*, 4 U. C. App. Rep., 144.

If an offer is made by letter in which the person making the offer request an answer by telegraph, "yes," or "no," and states that, unless he receives the answer by a certain date, he "shall conclude 'no,'" the offer is made dependent upon an actual receipt of the telegram on or before the date named: *Lewis v. Browning*, 130 Mass., 173.

Where, by correspondence through the mails, parties have fully agreed upon the terms of the contract, it is not necessary, in order to bind them, that the contract should be formally executed; but, if it appears that the parties intended that they should not be bound until the formal execution of the contract, this intention must govern: *Bourne v. Shapleigh*, 9 Mo. App. Rep., 64.

1880

Burliner v. Royle.

[5 Common Pleas Division, 351.]

March 23, 1880.

[IN THE COURT OF APPEAL.]

LORD AVELAND, *Appellant*; LUCAS, *Respondent*.*Highway—Repair—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—“Excessive Weight”—“Extraordinary Traffic.”*

The appellant employed on a highway a traction engine drawing two wagons for the carriage of materials and goods used for ordinary purposes on his estate (the engine being of less weight than was allowed by s. 28 of the Highways and Locomotives (Amendment) Act, 1878, and having its wheels constructed in accordance with the provisions of that section), and thereby did damage to the highway beyond that caused by the ordinary wear and tear:

*Held*, that this was “excessive weight” and “extraordinary traffic,” the damage caused by which was properly chargeable upon the appellant under s. 23 of the act.

Judgment of the Common Pleas Division, *ante*, p. 211, affirmed.

[5 Common Pleas Division, 354.]

Aug. 7, 1880.

354] \*BURLINER V. ROYLE and Another.

*Bankruptcy—Composition—Debt—Bills given—Dishonored—Statement of Amount—Original Cause of Action—32 & 33 Vict. c. 71, s. 126.*

Being indebted to the plaintiff for goods sold to the amount of £143 12s. 9d., the defendants gave him bills for the sum, less discount, but adding interest, so that the amount of the bills was £142 7s. 3d. These bills were dishonored. The defendants compounded with their creditors under s. 126 of the Bankruptcy Act, 1869, and, in the statement of debts, entered the amount of the debt due to the plaintiff, a non-assenting creditor, as £142 7s. 3d., viz., the amount of the bills. The plaintiff sued for £143 12s. 9d., the original debt. The defendants pleaded the composition:

*Held*, by Lopes, J., that the original cause of action was suspended but not satisfied by the bills, and revived when they were dishonored; that, therefore, at the date of the composition, the amount of the debt due to the plaintiff was £143 12s. 9d., and, as it was not correctly shown in the statement, the composition was no bar to his action.

**FURTHER CONSIDERATION.** The action was for a debt. The defence set up a composition under s. 126 of the Bankruptcy Act, 1869.

The facts of the case were thus stated in the judgment of Lopes, J.

The defendants had purchased goods of the plaintiff on the following terms,—On the 1st of each month invoices were to be sent in, including all goods up to the 20th day of the preceding month. Ten per cent. was to be taken in any case off the gross amount, and 2½ per cent. on the balance after the deduction of the 10 per cent. if cash was paid,

but not otherwise. In these circumstances, the defendants became indebted to the plaintiff in the sum of £143 12s. 9d., i.e., the gross sum less 10 per cent., but including the 2½ per cent., which was not deductible because cash had not been paid. The defendants, not being able to pay, gave the plaintiff two bills for £81 11s. 3d. at three months, and for £60 16s. at two months, respectively; total £142 7s. 3d. This sum was arrived at by deducting from the gross amount the 10 per cent. and 2½ per cent., and adding interest at 5 per cent. during the currency of the bills. These bills were not paid at maturity.

\*The defendants went into liquidation, and com- [355  
pounded with their creditors. The plaintiff was a non-assenting creditor. The defendants entered the plaintiff in their statement as a creditor for £142 7s. 3d. (the amount of the bills), and not for £143 12s. 9d., the amount of the debt.

*Bigham*, for the plaintiff: The composition was not binding on the plaintiff because the amount due to him was not shown in the statement of the debtor. The amount which should have been shown therein was that of the original debt and not that of the bills given in respect of it. The effect of taking the bills for it was merely to suspend the remedy and not to extinguish the original cause of action. On the dishonor of the bills the right revived: *In re Cumberland. Ex parte Worthington* (¹). 32 & 33 Vict. c. 71 (The Bankruptcy Act, 1869), s. 126, must be strictly complied with. By that section the provisions of a composition shall be binding on all the creditors whose names and addresses and the "amount of the debts" due to whom, are shown in the statement of the debtor . . . but shall not affect or prejudice the rights of any other creditors. "The amount" is the sum due, and it must be exactly stated. Substantial compliance with the section will not suffice. In *Ex parte Mathewes, In re Angel* (²), an acceptor of bills which had not to his knowledge been negotiated, took proceedings for liquidation by composition, and in his list of creditors entered the drawer as his creditor for the amount of the bills without stating that the debt was due on bills of exchange. The bills had in fact been negotiated, and the holder received no notice of the meeting of creditors. The court held that the holder was not bound by the resolutions at the meeting and was entitled to pursue his remedies irrespectively of them. Mellish, J., said the question was whether the debtor was discharged. "He cannot be discharged unless the act

(¹) 3 Ch. D., 803; 18 Eng. R., 841.

(²) Law Rep., 10 Ch., 304.

1880

Burliner v. Royle.

says so, and we cannot alter the act even if such a case as this should appear to be omitted from it by oversight."

The conditions of s. 126 are for the benefit of creditors, and must be strictly fulfilled by the debtor: see *Wilson v. 356*] *Breslauer* (1), \**Ex parte Lang* (2); *Ex parte Jerningham*, *In re Jerningham* (3). By slightly understanding the amounts of many different debts, the debtor could gain a considerable aggregate sum, if the composition founded on such statement were binding on non-assenting creditors.

*Crispe* and *Phipson*, for the defendants: First. There was a novation. The bills *In re Cumberland* (4) were for the exact amount of the goods, less discount. Here the bills were for a new consideration, viz., interest.

Secondly. Sect. 126 has been substantially complied with. In *Ex parte Mathewes* (5) the creditor's name was not entered in the statement. Here the name was entered therein. It is evident, from the judgment in *Ex parte Jerningham* (6), that a merely formal defect will not invalidate the composition. There may be two kinds of composition under the section—one where there is no trustee appointed, the other where there is a trustee: see per Brett, J., *Campbell v. Im Thurn* (7). Here there was one. He should have inquired and ascertained the amount of the debt, as he is entitled to do: *Ex parte Botting*. *In re Bostel* (8). The debtor is not liable for the default of the trustee: *Ex parte Waterer*, *Re Taylor* (9).

*Cur. adv. vult.*

Aug. 7. LOPES, J.: All allegations of fraud were withdrawn by the plaintiff. There is only one question left in the case which the parties agreed to leave to me. That question is whether the defendants (compounding debtors) have so complied with the 126th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), as to prevent the plaintiff (a non-assenting creditor) from recovering the full amount of his debt. [After stating the facts as above set forth, the learned judge proceeded:]

It was contended that the taking the bills with interest constituted a new agreement, and that, the old debt being extinguished, the amount in the debtor's statement (£142 357] 7s. 3d.) was correct. \*I cannot adopt this view. I think the effect of giving the bills was, to suspend the origi-

(1) 2 C. P. D., 314; 3 App. Cas., 672; (4) 3 Ch. D., 803; 18 Eng. R., 841.  
24 Eng. R., 460. (5) Law Rep., 10 Ch., 304.

(2) 5 Ch. D., 971; 22 Eng. R., 582.

(6) 1 C. P. D., 267.

(3) 9 Ch. D., 466; 26 Eng. R., 252.

(7) Law Rep., 19 Eq., 261.

(8) 43 L. J. (Bkcy.), 25.



nal cause of action only, which was not satisfied, but revived when the bills were not paid at maturity. At the time of the liquidation, therefore, the debt due to the plaintiffs was £143 12s. 9d., and the amount shown in the debtor's statement only £142 7s. 3d.

The Bankruptcy Act, 1869, s. 126, par. 7, enacts that the provisions of a composition accepted by an extraordinary resolution in pursuance of this section, shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor produced at the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors.

Has the amount of the debt due to the plaintiff in this case been correctly shown in the debtor's statement? I think not. I entirely concur with Brett, J., when in *Wilson v. Breslauer* (1) he says, that if a creditor who is non-assenting or dissenting is to be bound, all the requisites to bind non-assenting or dissenting creditors must be strictly complied with. The names of the creditors must be inserted in the statement of affairs of the debtor, and the amount of the debts; and unless both these conditions are fulfilled, the creditor will not be bound by the composition. The same opinion is expressed by Cotton, L.J., in *Re Jerningham* (2), and by James, L.J., in *Ex parte Lang* (3).

I therefore give judgment for the plaintiff for £143 12s. 9d. and costs.

*Judgment for the plaintiff.*

Solicitors for plaintiff: *Goldberg & Langdon.*

Solicitor for defendants: *Godden.*

(1) 2 C. P. D., 314, at p. 332.

(2) 5 Ch. D., 971, at p. 973; 22 Eng.

(3) 9 Ch. D., 466, at p. 468; 26 Eng. R., 682.

R., 252.

[5 Common Pleas Division, 358.]

May 3, 1880.

\*TAYLOR v. M'KEAND and Another.

[358

*Bill of Sale—Stock in Trade—Implied License to dispose of Goods—License to deal with them in the ordinary course of business—Fraudulent Sale.*

B., a trader, assigned to the plaintiff his stock-in-trade by a bill of sale with a proviso that until default in payment of the money advanced B. should be entitled to make use of such stock without hindrance or disturbance on the part of the grantee. B. afterwards sold the goods to the defendants by private contract, and absconded. The jury found that "B. sold the goods fraudulently, and not in the ordinary course of his business; but the defendants did not know this, and bought the goods *bona fide*:"

1880

Taylor v. M'Keand.

*Held*, that, upon this finding, the verdict was properly entered for the plaintiff: the right of the grantor to deal with the goods being subject to the implied condition that the dealing should be only in the ordinary course of his business.

**ACTION** for wrongful conversion of the plaintiff's goods.

On the 1st of October, 1878, one Bass, a draper in Peckham, in consideration of a loan of money, assigned to the plaintiff by bill of sale, amongst other things, his stock-in-trade, covenanting to repay the money on demand, Bass in the meantime and until default to hold and make use of the goods without hindrance or disturbance on the part of the grantee. On the 24th of October (and before any default made), the defendants, who were also drapers, purchased of Bass, by private arrangement through an auctioneer, his book-debts, and also the goods in question, which formed part of the stock-in-trade conveyed to the plaintiff by the bill of sale, for £13 1s. 3d. Bass immediately afterwards absconded.

At the trial before Lopes, J., at the last sittings in Middlesex, it was contended for the plaintiff that the sale not being a sale by the grantor of the bill of sale in the ordinary course of his business, no property in the goods passed thereby to the defendants.

The learned judge left it to the jury to say whether Bass sold the goods in the ordinary course of his business. The jury found that "Bass sold the goods fraudulently, and not in the ordinary course of his business; but the defendants did not know this, and bought the goods *bona fide*."

Judgment was thereupon entered for the plaintiff.

359] \*A rule *nisi* for a new trial having been obtained on the ground of misdirection,

*Douglas Kingsford*, showed cause: The question was properly left to the jury. If Bass parted with the stock otherwise than in the ordinary course of his business of a draper, he did so in fraud of the bill of sale. The *bona fides* of the buyers was wholly immaterial. The very object of the grantee in making the advance was to enable the grantor to continue to carry on his business, not to stop it. The latter could not transfer any property in the goods by a sale otherwise than in the ordinary course of his business, which the jury have negatived: *Cochrane v. Rymill* (1); *National Mercantile Bank v. Hampson* (2).

*Oppenheim*, in support of the rule: At the time the defendants bought the goods Bass was in possession of them with the consent of the plaintiff, appearing to the world as the owner and entitled to deal with them; no demand having

(1) 27 W. R., 776.

(2) 5 Q. B. D., 177; 29 Eng. R., 252.

then been made, and consequently no default. The finding, therefore, that the defendants bought the goods *bona fide*, and in ignorance of any fraud on the part of Bass, was most material. It is a fundamental principle that, if one of two innocent persons must suffer by the wrongful act of a third, he who by his conduct enables that third person to do the wrong must bear the loss. The learned judge ought to have told the jury that, if the defendants purchased the goods *bona fide* and without a knowledge of what was passing in the mind of Bass, the plaintiff must fail.

[DENMAN, J.: However exceptional and out of the ordinary course of business the transaction might be?]

Yes. The intention of Bass was not the true question. The evil result here was due to the laches of the plaintiff: *Walker v. Clay* (').

LORD COLERIDGE, C.J.: I am of opinion that this rule should be discharged. The action is brought by the holder of a bill of sale, whereby, amongst other things, certain stock-in-trade of the grantor were assigned to the plaintiff. These goods the grantor \*sold to the defendants. [360] The jury found that the grantor sold the goods fraudulently and not in the ordinary way of business; but that the defendants did not know this, and bought the goods *bona fide*. Under these circumstances can the defendants hold the goods? I think they cannot. They were the goods of the plaintiff by a perfectly valid contract,—a contract which is by statute declared invalid only as against certain persons of whom the plaintiff is not one. That amounts to a parliamentary recognition of the goodness of the plaintiff's title to the goods. How is that got rid of? It is said that a bill of sale of stock-in-trade, when the trade is to be carried on, must always be subject to an implied condition that the grantor shall have liberty to deal with the goods for the purposes of the business; and that, if that were not so, it would stop the business altogether, which would be contrary to the intention of the parties. But, in expressing that condition, the law ingrafts upon it this limitation, that the business must be carried on *bona fide*, and the disposition of the goods must be *bona fide* and in the ordinary course of business. That is the state of the law as laid down in *National Mercantile Bank v. Hampson* (') in the Queen's Bench Division. That state of the law will not protect the defendants here, inasmuch as the goods in question were not sold in the ordinary course of business. The exact words which I have used are not found in the judgment of my

(') 42 L. T., 369.

(') 5 Q. B. D., 177; 29 Eng. R., 252.

Brother Lush as given in the Law Reports: but I cannot help thinking that they are intended to be implied. In the first place, in the absence of that qualification the security would be gone; and, in the next place, I think it is clear from the pleadings that the defence rested upon it; for, the statement of defence alleged that Seaman sold the wheat to the defendant, and the defendant bought the same in the ordinary course of his business and without any notice that it did not belong to Seaman; that Seaman was suffered by the plaintiffs to carry on his business as a farmer and dealer in grain at the time of the sale; and that it was in the ordinary course of Seaman in such business to make such sale. Lush, J., in giving judgment, says: "There was an implied license for the grantor to carry on his business and to sell the wheat." Here the defendants have bought property of 361] another which the vendor \*had no right to sell, because he did not sell it in the only way in which he could sell, viz., in the ordinary course of business. Then it is said that, if one of two innocent persons must suffer by the wrongful act of a third person, he who by his conduct enabled that third person to do the wrong must bear the loss. I do not say that that is not correct as a general proposition. But here the holder of the bill of sale,—an instrument known to the law, by which the property is taken out of the grantor and conveyed to the grantee absolutely, save in certain excepted cases, of which this is not one,—claims to recover his property, of which the defendants have possessed themselves in a manner which is not warranted by the terms of the bill of sale or by any legal implication from them. I think the ruling of my Brother Lopes was right, and that this rule must be discharged.

DENMAN, J., concurred.

*Rule discharged.*

Solicitor for plaintiff: *J. Laidman.*

Solicitors for defendants: *Hicklin & Washington.*

See note to *Lazarus v. Andrade*, ante, p. 805.

# INDEX.

---

## A.

### ABATEMENT.

1. An action was brought to recover from the promoters of a public company the price paid by the plaintiff for shares which had proved valueless, on the ground that the prospectus issued by them, in breach of s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), omitted to disclose certain contracts, which ought to have been specified therein. After judgment and pending an appeal to the House of Lords the plaintiff died:

*Held*, affirming the decision of the Common Pleas Division, that under Order L, Rule 4, of the Rules of 1875, the plaintiff's interest in the action survived and was capable of "transmission" to his personal representative. *Twycross v. Grant*.

893,

899 note.

### ACCEPTANCE.

*See* AGREEMENTS, 833, 839 note.  
BILLS OF EXCHANGE, 72.

### ACCRETION.

*See* NAVIGABLE RIVERS, 648, 659 note.

### ADEMPTION.

*See* LEGACY, 579.

### ADMIRALTY.

1. *Bill of Lading*. Bags of sugar, shipped by the plaintiffs, were carried in the defendants' steamship from Hamburg to London at an agreed freight. The vessel was chartered for the voyage by P. & K., but the plaintiffs had no knowledge of the charter. The plaintiffs received a bill of lading by the terms of which the sugar was to be delivered in good order, the usual perils and "all accidents, loss, and damage of whatsoever nature or kind, and howsoever occasioned . . . from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted, and it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper, owner, or consignee thereof, and the ship and shipowner be considered the servants of such shipper, owner, or consignee." This bill of lading was signed "P. & K., agents." It is a custom in the case of steamships for the brokers, and not the master, to sign the bills of lading.

Oxide of zinc in casks was negligently stowed above the sugar and

consequently damaged it. In an action for the damage, the court, being empowered to decide questions of fact, and finding that the bill of lading was signed by P. & K., as agents for the defendants and with their authority:

*Held*, that the defendants were bound, and even assuming the absence of such actual authority would have been, under the circumstances, bound by the bill of lading; that the damage from negligent stowage was not within the exceptive clause; and that, therefore, the plaintiffs were entitled to recover. *Hayn v. Culliford*. 259

2. *Charterparty*. By a charterparty the vessel was to deliver at H., "or so near thereto as she could safely get;" to discharge as customary; the cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. and sent in them to H. Her owner having sued the charterer to recover the lighterage expenses:

*Held*, that a defence alleging that by the custom of the port of H. the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses. *Hayton v. Irwin*. 728

3. *Charterparty*. On the 24th of June the defendants, who were shipbrokers, wrote to the plaintiffs, offering them "room" in a ship called F. K. Dumas for certain cement and stone from London to Callao. On the 26th of June the defendants chartered the ship for the voyage, the charterparty providing, *inter alia*, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded at her berth by and for the owners independently of the charter; that the mas-

ter was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; and that the charterers' responsibility, except for freight, should cease on the vessel being loaded. On the 26th of June an agreement was made between the defendants, acting for the owners of the F. K. Dumas, and the plaintiffs, that the former should receive on board cement and stone at certain freight from London to Callao, and sail on a certain day: freight to be paid one half on signing bills of lading, and the remainder on final discharge at Callao.

The cement and stone were shipped, the half freight paid, and the master signed bills of lading making the remainder payable at Callao. On her voyage the ship, being damaged by bad weather, put into an intermediate port, where the vessel was condemned. The master, being unable to forward the plaintiffs' goods to their destination, sold them. In an action against the defendants for their value, the jury found that the sale was not justified:

*Held*, affirming the judgment of Denman, J., that on the construction of the above documents there was no contract between the plaintiffs and the defendants for the carriage of the goods from London to Callao. *Wagstaff v. Anderson*. 753

4. *Charterparty*. A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.

The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the Arion, and the master, in consideration of £1,000, agreed to tow her into the Texel, which was out of his direct course. Whilst so doing the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost. The jury found that it was not reasonably necessary to take the Arion to the Texel in order to save the lives of those on board her; but it was reasonably necessary to do so in order to save her and her cargo:

*Held*, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover the value

of the cargo against the defendants as owners of the ship. *Scaramanga v. Stamp.* 782

5. *Warranty.* A description in a charterparty that a vessel is of a particular class is not a continuing warranty, but applies only to the classification at the time the charterparty is made. *French v. Newgass.* 77

6. By a charterparty the charterer engaged to ship in Australia a full cargo for a port in England at a freight of 60s. per ton *in full*; ship paying all port charges, pilotages, and towages: the freight to be paid in cash on right delivery of cargo at port of discharge, less advances, exchange, and commission: the captain to sign bills of lading for cargo as presented, at any rate of freight required by charterer; but, should the total freight by bills of lading amount to less than the total chartered freight, the difference to be paid the master in cash before sailing.

The master (who was paid a fixed salary, "to include all charges and allowances,") signed a bill of lading for the whole cargo making the goods deliverable to "order or assigns, freight to be paid in cash at port of discharge, the rate of discharge, rate of freight, and other conditions as per charterparty, with 5 per cent. *primage in cash on delivery, as customary.*"

The cargo was received at the port of discharge by the defendants, the indorsees of the bill of lading, as agents of the charterer, and the freight paid:

*Held*, that the defendants were not liable for *primage*. *Caughey v. Gordon.* 287

7. By a charterparty it was agreed that the defendants' ship, the *R.*, should, after loading "dead weight" at *M.*, proceed to *V.*, a Spanish port, and there load a cargo of fruit for the plaintiff. At the time of entering into the charterparty the plaintiff knew that the "dead weight" intended to be put on board the *R.* at *M.* would consist of military stores, and he knew that by the ordinary law of Spain a vessel with warlike stores on board would not be allowed to load at a Spanish port. Upon application being made to the Spanish Government to relax the prohibition, permission to load was refused. The *R.* arrived at *V.* with the warlike stores on board, but otherwise ready

and fit to load the agreed cargo: she left immediately on learning that permission to load would not be granted:

*Held*, that the plaintiff could not sue the defendants for not having the *R.* ready to load, for, through the act of a superior power, the parties were unable to perform their respective duties under the contract, the plaintiff being unable to load the cargo, and the defendants to receive it. *Cunningham v. Dunn.* 289

8. Bags of sugar shipped by the plaintiffs were carried in the defendants' steamship from *H.* to *L.* at an agreed freight. The vessel was chartered for the voyage by *P. & K.*, who signed the bill of lading as agents. It contained a clause that the owners of the ship should not be liable for the default of the pilot, master or mariners in navigating the ship, and a further clause that the captain, officers and crew in the transmission of the goods should be considered the servants of the shipper, owner or consignee. The sugar was negligently stowed under oxide of zinc, and was consequently damaged. It did not appear how the sugar came to be shipped, nor with whom the plaintiffs made the contract of carriage:

*Held*, that the defendants were liable to compensate the plaintiffs for the damage done to the sugar; for either the defendants had contracted to carry the sugar upon the terms set out in the bill of lading, which did not relieve them from responsibility for negligent stowage; or if they had not contracted with the plaintiffs, they were liable for misfeasance, that is, for stowing the goods in such manner as to come into contact with a mischievous substance. *Hayn v. Culliford.* 482

9. The plaintiffs wishing to send cement and stone from London to Callao, the defendants, on the 24th of June, wrote offering them "room" for it in the ship *F. K. Dumas*, and on the 25th of June the defendants chartered the ship of the owners for a voyage from London to Callao by a charterparty providing, *inter alia*, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded in her berth

by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; that the ship should be addressed to the charterers' nominees at the port of discharge; and the charterers' responsibility, except for freight, was to cease on the vessel being loaded.

On the 26th of June an agreement was made between the defendants, "acting for the owners" of the ship, and the plaintiffs that the former should receive on board cement and stone at a certain freight from London to Callao and sail on a certain date. Freight to be paid, one half on signing bills of lading, and the remainder on final discharge at Callao.

The cement and stone were shipped, half freight was paid, and the master signed bills of lading making the other half payable at Callao; and the ship sailed, but being damaged by bad weather put into an intermediate port where she was condemned, and the captain sold the plaintiffs' goods, believing that he was unable to forward them.

The plaintiffs having sued the defendants for the value, the jury found that the sale was not justified:

*Held*, that the captain, in selling the goods, was not acting as the servant or agent of the defendants, and they were therefore not liable for the conversion.  
*Wagstaff v. Anderson.* 550

10. A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.

11. The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the *Arion*, and the master in consideration of £1,000 agreed to tow her into the Texel, which was out of his direct course. Whilst so doing, the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost.

In answer to questions put to them by the learned judge, the jury found that it was not reasonably necessary to take the *Arion* to the Texel in order to

save the lives of those on board her; but that it was reasonably necessary to do so in order to save her and her cargo:

*Held*, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover against the owners the value of the cargo. *Scaramanga v. Stamp.* 557

12. The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not, as between the shipowner and the owner of cargo, warrant an average adjustment at the intermediate port.

13. To entitle a shipowner, in the absence of a special contract, to demand *pro rata* freight, where the goods have been sold at an intermediate port (being so much damaged as not to be worth forwarding), it must be shown that the owner of the goods had an option of having them sent on or of accepting them at such intermediate port.

14. A ship sailed from Riga for Hull with a general cargo and was stranded, but was afterwards got off (part of the cargo having been washed out of her and part jettisoned) and towed into Copenhagen, where her cargo was discharged, and the ship, having been repaired at considerable expense, was sent on to Hull after a delay of about two months, with some of her cargo on board, other part having been sent on by the master in other vessels. The plaintiffs' goods were so much damaged as not to be worth sending on, and were (properly, but without the plaintiffs having an opportunity of exercising an option) sold at Copenhagen, and an average adjustment took place there according to Danish law, under which the plaintiffs were charged with *pro rata* freight from Riga to Copenhagen.

In an action for the price realized by the sale at Copenhagen:

*Held*, that the shipowners were not entitled to deduct the general average expenses ascertained by the adjustment at Copenhagen, nor *pro rata* freight.  
*Hill v. Wilson.* 573



AGENT.

See PRINCIPAL AND AGENT.

AGREEMENTS.

1. When party not chargeable for non-performance by reason of act of government. *Cunningham v. Dunn*. 289
2. By municipal corporation must be executed according to requirements of statute, or not bound, though has received benefit of agreement. *Hunt v. Wimbledon*. 400
3. An offer of a contract sent by letter cannot be withdrawn by merely posting a subsequent letter which does not, in the ordinary course of the post, arrive until after the first letter has been received and answered.
4. By letter of the 1st of October the defendants wrote from Cardiff offering goods for sale to the plaintiffs at New York. The plaintiffs received the offer on the 11th and accepted it by telegram on the same day, and by letter on the 15th. On the 8th of October the defendants posted to the plaintiffs a letter withdrawing the offer. This letter reached the plaintiffs on the 20th :

*Held*, by Lindley, J., that the withdrawal was inoperative, a complete contract binding both parties having been entered into on the 11th of October when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose was withdrawn. *Byrne v. Van Tienhoven*. 838, 839 note.

See CORPORATIONS, 106.

FRAUDS, STATUTE OF.  
PERFORMANCE, 518, 535 note.  
PRINCIPAL AND AGENT.  
REWARD, 360, 365 note.

AIR.

See EASEMENT, 474.

ALLUVION.

See NAVIGABLE RIVERS, 648, 659 note.

ANIMALS.

See NEGLIGENCE, 146.

ARBITRATION.

1. Claim, that the plaintiff contracted with a company to build a hall, the plans, bill of "quantities," &c., for which had been prepared by the defendant who was employed by the company, and named in the contract as their architect to carry out the works. The contract provided that the architect might order additions to or deductions from it, and that the amount of them should be ascertained by the architect in the same manner as the "quantities" had been measured, and at the same rate as they had been priced at; that the contractor and the company would be bound to leave all questions or matters of dispute which might arise during the progress of the works, or in the settlement of the account, to the architect, whose decision should be final and binding upon all parties, and that the contractor would be paid on the certificate of the architect. The claim then alleged that the contract was signed by the plaintiff in the belief and expectation, as the defendant well knew, that the defendant would use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff; that the work was done; that additions and deductions were ordered, and certificates given by the defendant, but that he did not use due care and skill in ascertaining the amounts, and neglected and refused to ascertain them in the same manner as the "quantities" had been measured, and at the same rate, and knowingly or negligently certified for a much less sum than was the net balance payable to the plaintiff, and refused to reconsider his final certificate, by reason whereof the plaintiff was unable to obtain payment from the company of the balance.

On demurrer :

*Held*, that the functions of the architect in ascertaining the amount due to the plaintiff were not merely ministerial, but such as required the exercise of professional judgment, opinion, and skill, and that he, therefore, occupied

the position of an arbitrator, against whom, no fraud or collusion being alleged, the action would not lie. *Stevenson v. Watson*, 451, 464 note.

### ARCHITECT.

*See* ARBITRATION, 451, 464 note.

### ASSIGNMENT.

*See* SET-OFF, 443.

### ATTACHMENT.

1. The proceeds of a judgment paid into the county court are not attachable by means of a garnishee summons at the suit of a third person as "a debt," due from the registrar of the court to the judgment debtor. *Dolphin v. Layton*, 440, 442 note.

### ATTORNEYS.

*See* HUSBAND AND WIFE, 241, 249 note.  
NEGLIGENCE, 375, 381 note.  
TENDER, 447.

## B.

### BAGGAGE.

*See* CARRIERS, 117, 123 note.

### BANKRUPTCY.

1. Being indebted to the plaintiff for goods sold to the amount of £143 12s. 9d., the defendants gave him bills for the sum, less discount, but adding interest, so that the amount of the bills was £142 7s. 3d. These bills were dishonored. The defendants compounded with their creditors under s. 126 of the Bankruptcy Act, 1869, and, in the

statement of debts, entered the amount of the debt due to the plaintiff, a non-assenting creditor, as £142 7s. 3d., viz., the amount of the bills. The plaintiff sued for £143 12s. 9d., the original debt. The defendants pleaded the composition:

*Held*, by Lopes, J., that the original cause of action was suspended but not satisfied by the bills, and revived when they were dishonored; that, therefore, at the date of the composition, the amount of the debt due to the plaintiff was £143 12s. 9d., and, as it was not correctly shown in the statement, the composition was no bar to his action. *Burliner v. Royle*, 840

*See* COMPOSITION, 607, 611 note.  
SECURITY FOR COSTS, 229.

### BASTARDY.

1. A bastardy order under 35 & 36 Vict. c. 65, cannot be made where the mother has married since the birth of the child, and is at the time of the application living with her husband, although she took out a summons against the putative father before her marriage, and was prevented from serving it by his default. *Tozier v. Lake*, 562 and note.

*See* EVIDENCE, 585, 593 note.

### BILLS OF EXCHANGE.

1. Since the passing of the statute 19 & 20 Vict. c. 97, s. 6, simply writing the name of the drawee across the face of a bill of exchange does not constitute a valid acceptance; there must also be upon the face of the bill some word or words indicating an intention on the part of the drawee to be bound by it as acceptor. *Hindhaugh v. Blakey*, 72

*See* FORGERY, 678, 687 note.  
PAYMENT, 46.

### BILL OF LADING.

*See* ADMIRALTY, 260, 267, 289, 483.  
PAYMENT, 46.

## BILL OF PARTICULARS.

1. A plaintiff may be ordered to give particulars of items which are, in his claim, placed to the credit of the defendant. *Godden v. Corsten*. 690, 692 note.

## BILLS OF SALE.

1. A ship built in order to be sold to a foreigner, and to be delivered to him at a foreign port, was assigned by her builder to the plaintiff for a valuable consideration, under an agreement which was not in the form of a bill of sale given by the Merchant Shipping Act, 1854. The assignment was not registered, either under that act or under the Bills of Sale Act, 1854. At the time of the assignment the vessel had been completely built and had been tried:

*Held*, that the ship was not a British ship within the meaning of the Merchant Shipping Act, 1854, and that an assignment of her need not be by bill of sale, nor registered under that statute.

2. *Held*, also, that an assignment of her fell within the proviso in the Bills of Sale Act, 1854, s. 7, which exempts assignments of a ship from the operation of that statute. *Union Bank v. Lenanton*. 139

See CHATTEL MORTGAGES, 702, 727, 794, 803, 805 note, 820, 843.

## BONA FIDE.

See CHATTEL MORTGAGES, 794, 803, 805 note, 843.

## BRIBERY.

See ELECTIONS, PUBLIC, 53.

## BROKER.

See ESTOPPEL, 19, 36 note.

## BUILDINGS.

See MUNICIPAL CORPORATIONS, 155.

## BY-LAWS.

See MUNICIPAL CORPORATIONS, 155.

## C.

## CARRIERS.

1. A railway company are not insurers in respect of luggage placed at a passenger's request in the same compartment in which he intends to travel; and they will not be liable to compensate him if luggage so placed is lost or stolen without any negligence on their part. *Bergheim v. Great Eastern, etc.* 117, 123 note.
2. Liable for negligently stowing property so it was injured by other property,—as sugar by oxide of zinc. *Hayn v. Culliford*. 483
3. The defendants, the Metropolitan District Railway Company, have running powers over the South Western Railway between Hammersmith and the New Richmond station of the South Western Railway Company. Above the booking office at the New Richmond station are the words "South Western and Metropolitan Booking Office and District Railway." The plaintiff took from the clerk there employed by the South Western Railway a return ticket to Hammersmith and back. The ticket was not headed with the name of either company, but bore on it the words "Via District Railway." On his return journey from Hammersmith to Richmond the plaintiff travelled with his ticket in a carriage of a train belonging to the defendants and under the management of their servants. The carriage being unsuited for the New Richmond station platform, the plaintiff, on alighting there, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them:

*Held*, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, even assuming the ticket not to have been issued by or for them, but by the South Western Company. *Foulkes v. Metropolitan, etc.* 538, 550 *note*.

See ADMIRALTY, 260, 267, 289.

RAILWAYS, 277, 284 *note*, 289, 433, 435 *note*, 671 676 *note*, 740, 752 *note*.

#### CASES AFFIRMED, REVERSED, OVERRULED, AND CONSIDERED.

Amos *v.* Chadwick, 26 Eng. Rep., 243, *followed*. 328  
 Aveland *v.* Lucas, 30 Eng. Rep., 211, *affirmed*. 840  
 Belmonte *v.* Aynard, 30 Eng. R., 503, *affirmed*. 593  
 Bingham *v.* Allport, 1 Nev. & Man., 398, *followed*. 447  
 Brown *v.* London, etc., 32 L. J. (Q. B.), 318, *followed*. 18  
 Coxhead *v.* Mullis, 30 Eng. Rep., 285, *distinguished*. 612  
 Crawshay *v.* Thornton, 2 Myl. & Cr., 1, *discussed*. 295  
 Davis *v.* Goodman, 5 C. Pl. Div., 20, *reversed*. 727  
 Dickson *v.* Reuter's, etc., 19 Eng. R., 313, *affirmed*. 1  
 Ford *v.* Cotesworth, L. R., 4 Q. B., 127; 5 id., 544, *followed*. 289  
 Foulkes *v.* Metropolitan, etc., 30 Eng. R., 533, *affirmed*. 740  
 Fowler *v.* Lock, 2 Eng. R., 536; 11 id., 268, *distinguished*. 62  
 Frazer *v.* Marsh, 13 East, 238, *distinguished*. 62  
 Hayn *v.* Culliford, 30 Eng. Rep., 259, *affirmed*. 483  
 Henderson *v.* Stevenson, L. R., 2 H. L. (S. C.), 470, *distinguished*. 671  
 Hunt *v.* Wimbledon, etc., 30 Eng. R., 106, *affirmed*. 400  
 Hurst *v.* Osborne, 18 C. B., 144, *followed*. 72  
 Johnson *v.* Credit Lyonnais, 20 Eng. R., 486, *affirmed*. 19  
 London, etc., *v.* Chase, 12 C. B. (N. S.), 730, *disapproved*. 595  
 London, etc., *v.* Watson, 30 Eng. Rep., 277, *affirmed*. 433

Meyerhoff *v.* Froehlich, 30 Eng. Rep., 200, *affirmed*. 413  
 Oakes *v.* Turquand, L. R., 2 H. L., 325, *discussed*. 156  
 Oxenden *v.* Cropper, 4 Dowl., 574, *overruled*. 229  
 Parker *v.* South Eastern, etc., 21 Eng. R., 349, *considered*. 671  
 Phillips *v.* London, etc., 28 Eng. Rep., 844; 29 id., 177, S. C., 769  
 Portal *v.* Emmens, 1 C. Pl. Div., 201, 664, *distinguished*. 220  
 Prettyman's Case, 2 Vern., 279, *discussed*. 10  
 Prudential, etc., *v.* Knott, 11 Eng. R., 498, *considered*. 209  
 Roe *v.* Hammond, 2 C. Pl. Div., 300, *overruled*. 112  
 Scaramanga *v.* Stamp, 30 Eng. R., 537, *affirmed*. 782  
 Shaw *v.* Earl Jersey, 30 Eng. R., 120, *affirmed*. 595  
 Stephens *v.* Australian, etc., 4 Eng. R., 296, *considered*. 469  
 Thompson *v.* Lapworth, L. R., 3 C. Pl., 149, *distinguished*. 231  
 Thorley's, etc., *v.* Massam, 23 Eng. R., 182, *considered*. 309  
 Tidswell *v.* Whitworth, L. R., 2 C. Pl., 326, *followed*. 231  
 Twycross *v.* Grant, 21 Eng. Rep., 387, *see* 393  
 Wagstaff *v.* Anderson, 30 Eng. R., 550, *affirmed*. 752  
 Webb *v.* Bird, 13 C. B. (N. S.), 841, *followed*. 474  
 Yglesias *v.* Mercantile, etc., 30 Eng. R., 46, *affirmed*. 198  
 Yorkshire, etc., *v.* Beatson, 30 Eng. R., 493, *affirmed*. 759

#### CHARTERPARTY.

See ADMIRALTY, 77, 260, 267, 289, 557, 728, 782.

#### CHATTEL MORTGAGES.

1. The "description of the residence" of the maker of a bill of sale, required by the Bills of Sale Act, 1854, s. 1, to be stated in the affidavit filed therewith, must be his residence at the time of swearing the affidavit and not of ex-

- cutting the bill of sale. *Button v. O'Neill*. 595
2. The affidavit filed with a registered bill of sale stated that the grantor "was until lately" a commercial traveller. It appeared that the grantor was a commercial traveller at the date of the execution of the bill of sale:  
*Held*, that the description of his occupation was insufficient to satisfy the provisions of 17 & 18 Vict. c. 36, s. 1. *Castle v. Downton*. 702
3. A bill of sale to which the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), applies, if it be not explained to the grantor and attested by a solicitor in compliance with ss. 8 and 10, is not void as between the grantor and grantee:  
So *held*, overruling the judgment of the Common Pleas Division. *Davis v. Goodman*. 727
4. The doctrine of consolidation of mortgages does not enable the grantee by a registered bill of sale of goods seized under a *fi. fa.* to tack a prior mortgage of other property of the grantor, and claim that the surplus proceeds of the goods, after discharging the sum secured by the bill of sale, shall be applied in satisfaction of the prior mortgage, so as to defeat the right of the execution creditor to such surplus. *Chenworth v. Hunt*. 763
5. Goods were vested in a trustee with power to sell them upon the direction of his *cestui que trust*. The *cestui que trust*, with the authority of the trustee, executed and registered a bill of sale assigning the goods:  
*Held*, that the bill of sale was void as against execution creditors.
6. A judgment of the county court may, upon appeal, be upheld on other grounds than those on which the county court judge proceeded, if they appear and are admitted in his notes.
7. A county court judge decided that a registered bill of sale, given by a person out of possession of the goods assigned and deriving title from a grantee under an unregistered bill of sale, was invalid against an execution creditor.  
*Held* by Grove, J. (Lopes, J., dissenting), that this decision was correct. *Chapman v. Knight*. 794
8. By bill of sale the grantor assigned to the grantee the stock-in-trade then in certain specified premises, and also the stock-in-trade which should or might at anytime during the continuance of the security be brought into the premises, either in addition to or in substitution for stock-in-trade therein at the date of the bill of sale:  
*Held*, by Lopes, J., that the assignment was sufficient to pass the property in stock-in-trade afterwards brought into the premises in addition to or in substitution for that previously there. *Lazarus v. Andrade*. 803, 805 note.
9. The consideration for a bill of sale was stated to be "the sum of £182 3s. now paid by the grantee to the grantor." That sum was, at the request and with the assent of the grantor, in fact paid thus,—£8 3s. 3d. and £103 17s. 5d. to discharge two executions against the grantor's goods,—£25 0s. 9d. to a solicitor (who attested the execution of the bill of sale) for money lent and for costs due to him from the grantor,—and the balance, £45 1s. 7d., in cash to the grantor:  
*Held*, in the absence of any suggestion of fraud, a sufficient setting forth of the consideration, within 41 & 42 Vict. c. 31, s. 8. *Hamlyn v. Betteley*. 820
10. B., a trader, assigned to the plaintiff his stock-in-trade by a bill of sale with a proviso that until default in payment of the money advanced B. should be entitled to make use of such stock without hindrance or disturbance on the part of the grantee. B. afterwards sold the goods to the defendants by private contract, and absconded. The jury found that "B. sold the goods fraudulently, and not in the ordinary course of his business; but the defendants did not know this, and bought the goods *bona fide*."  
*Held*, that, upon this finding, the verdict was properly entered for the plaintiff: the right of the grantor to deal with the goods being subject to the implied condition that the dealing should be only in the ordinary course of his business. *Taylor v. McKeand*. 843

## CHECKS.

*See* FORGERY, 678, 687 *note*.

## CHIMNEY.

*See* EASEMENT, 474.

## CLERK.

*See* NEGLIGENCE, 375, 381 *note*.

## COLLATERALS.

*See* PAYMENT, 46.

## COMMISSION.

*See* INTERROGATORIES, 701.

## COMPLAINT.

*See* PLEADINGS, 435.

## COMPOSITION.

1. At a meeting of the defendant's creditors, the following agreement, to which the plaintiff was an assenting party, was made and signed by all the creditors present: "We the undersigned creditors of W. B., in consideration of 10s. in the pound on our respective debts set opposite to our respective names, hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said W. B.: the whole of the creditors receiving not exceeding a like sum in discharge of their debts."

At the time of entering into this agreement, it was known that the debtor was being sued in a county court by one P. as executor of a creditor for

a small sum which was afterwards paid in full the day before the cause was ripe for trial:

*Held*, that the agreement was limited to the creditors signing it; and that, even if it were not so, the payment to P. being made under pressure, and not in pursuance of a prior arrangement to give him a preference, did not render the transaction void. *Carey v. Barrett*. 607, 611 *note*.

*See* BANKRUPTCY, 840.

## COMPROMISE.

*See* BANKRUPTCY, 840.

## CONDITIONAL SALES.

*See* SALES.

## CONFLICT OF LAWS.

*See* LEX LOCI.

## CONSOLIDATION.

*See* STAT, 828.

## CONSTABLE.

*See* REWARD, 360, 365 *note*.

## CONTRACTOR.

*See* MASTER AND SERVANT, 331, 337 *note*.

## CONTRACTS.

*See* AGREEMENTS.  
CORPORATIONS, 106.

CONVERSION.

See ADMIRALTY, 550.  
TITLE, 350.

CONVICT.

See CRIMINAL LAW, 507, 512 note.  
NEGLIGENCE, 337 note.

CORPORATE MEETINGS.

See STOCKHOLDERS, 156.

CORPORATIONS.

1. Sect. 85 of the Public Health Act, 1848, and s. 174 of the Public Health Act, 1875, enact (without any words of prohibition) that "every contract made by a local board, or by an urban authority, whereof the value or amount exceeds [£10] £50, shall be in writing, and sealed with the common seal of such authority."

The defendants, a "local board" and an "urban authority" under the above mentioned acts, verbally directed their surveyor to employ the plaintiff to prepare plans for new offices. The plans were prepared and submitted to and approved and used by the defendants, but the proposed offices were never erected. There was no contract under the corporate seal, nor any ratification under seal of the act of the surveyor in procuring the plans; nor was there any resolution of the board authorizing their preparation:

*Held*, that, by reason of the non-compliance with the statutory requirements, the contract could not be enforced,—notwithstanding that the jury found that the board authorized their surveyor to procure the plans and ratified his act, that new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of them.  
*Hunt v. Wimbledon, etc.* 106

2. A corporation cannot sue for penalties as a common informer, unless expressly empowered by statute so to do.

30 ENG. REP.

3. The act 1 & 2 Wm. 4, c. lxxvi, by s. xlv, imposes a penalty on coal dealers who knowingly sell one sort of coals for another within a certain district, and the penalty is recoverable under s. lxxiv, "by the person or persons who shall inform and sue for the same":

*Held*, that a board of guardians, being a corporation, did not come within the terms of s. lxxv, and therefore could not sue for the penalty.  
*Guardians, etc., v. Franklin.* 237

See DIRECTORS, 619, 631 note.

JURISDICTION, 18.

PRINCIPAL AND AGENT, 820, 825 note.

STOCKHOLDERS.

COSTS.

See SECURITY FOR COSTS.  
STAT, 105.

COUNTER-CLAIM.

See JURISDICTION, 125.  
SET-OFF, 382, 694.

COVENANTS.

1. By a contract for the sale of a public house, the vendor agreed to assign and the purchaser agreed to take the lease, "subject to the yearly rent of £90 and the performance of the *covenants* thereby reserved and contained, such covenants being common and usual in leases of public houses." Upon investigating the title, the purchaser found that the lease under which the premises were held contained this clause: "Provided always and these presents are upon this express condition, that all and every underlease, deed of assignment, &c., which shall be made and executed during the term, shall be left with the solicitor of the ground-landlord within two months of its date, for the purpose of registration, and a fee of one guinea paid for such registration," and a power of re-entry in case of "breach or non-performance of any

of the covenants or other stipulations hereinbefore contained or referred to."

The purchaser refused to complete, on the ground that this was not a common and usual covenant; and the jury so found:

*Held*, that, whether the proviso in the head lease was a "covenant" in the strict sense or not, it was at all events a covenant within the contemplation of the agreement, and therefore the purchaser was not bound to complete. *Brookes v. Drysdale*. 38,

46 note.

*See* ESTOPPEL, 10, 17 note.  
TAXES, 596.

### CRIMINAL LAW.

1. A person sentenced to imprisonment for the space of one calendar month is entitled to be discharged on the day in the succeeding month immediately preceding the day corresponding to that from which his sentence takes effect.

2. On the 31st of October the plaintiff was sentenced to be imprisoned for one offence for one calendar month, and for a second offence for a period of fourteen days, commencing after the expiration of the calendar month. Pursuant to his sentence, he was detained in custody until the 14th of December:

*Held*, that the detention was lawful, for as the calendar month did not expire until the 30th of November, he was not entitled to be discharged from the second term of imprisonment until the full period of fourteen days computed from the 1st of December had expired. *Migotti v. Colvill*. 507,

512 note.

*See* ELECTIONS, PUBLIC, 486.

### CROPS.

*See* LANDLORD AND TENANT, 65.

### CUSTOM.

*See* LANDLORD AND TENANT, 65.

### D.

#### DAMAGES.

1. A lease was made between the plaintiff and defendant by which the plaintiff granted exclusive rights of sporting over his estate to the defendant, who covenanted that he would during the term keep down and destroy the rabbits on the estate, so that no appreciable damage might be done to the crops thereon. Appreciable damage was done to the crops of an occupier of the land by rabbits on the estate, but the plaintiff never was under any liability to compensate the occupier for any such damage, and paid him no sum whatever in respect thereof. In an action for breach of covenant:

*Held*, that the plaintiff having suffered no damage himself, and not being in the position of a trustee for the occupier, was entitled only to nominal damages. *West v. Houghton*. 487

2. In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice. *Phillips v. London, etc.* 769

*See* TELEGRAPH COMPANY, 1, 9 note.  
TITLE, 350.

### DAY.

1. On the 21st of October, the respondent kept a dog without having in force a license granted under 30 Vict. c. 5. He thereby became liable to a penalty under s. 8. His default was discovered by the excise, and he took out a license at a later hour on the same day.

Sect. 5 enacts that every license shall commence on the day on which the same shall be granted.

An information against him laid before a magistrate, charged his offence to have been committed on the 21st of October. At the hearing, he pro-



duced the license granted on the 21st of October, and the charge was dismissed:

*Held*, that the dismissal was wrong, because an offence had been committed on the 21st of October, and the subsequent license operated only from the time when it was granted, and did not relate back to the earliest moment of that day so as to justify the violation of the act before the license existed. *Campbell v. Strangeways*. 54, 57 note.

## DEBTOR AND CREDITOR.

*See* COMPOSITION, 607, 611 note.

## DEFAMATION.

1. Three men who believed themselves to be aggrieved by the conduct of the plaintiff in respect of a supposed claim upon him for wages or salary, applied to a magistrate in open court for a summons under the Master and Workman's Act. The magistrate declined to entertain the application, considering it a matter for a civil and not for a criminal court. The defendant afterwards published in a newspaper a report, which the jury found to be a fair report, of what passed before the magistrate:

*Held*, a privileged publication. *Unill v. Hales*. 188

*See* INJUNCTION, 209, 213 note.

## DIRECTORS.

1. The defendants, metal brokers, having previously sold ore of an American mine on a commission of 2½ per cent., arranged with a proprietor to assist in selling the mine to a company to be raised by him in England. He was to procure the appointment of the defendants as metal brokers of the company at the usual rate of English commission, viz., 1 per cent., and he promised

that the defendants should be liberally remunerated to the extent at least of £5,000 for their assistance, and to compensate for the loss of the higher commission. They were, as he knew, acquainted with facts detrimental to the reputation of the mine, and he promised the liberal remuneration to insure their silence respecting them.

The defendants assisted him in his endeavors to sell the mine to a company to be formed for the purchase of it, but left him to fix the price, get up the company, and manage all details respecting the sale. He procured the formation of the plaintiff company and the purchase by it of the mine for £100,000, half to be paid in cash and half in paid-up shares. The defendants were appointed metal brokers of the company at the 1 per cent. commission, allowed themselves to be named in the prospectus as being ready to answer any inquiries relating to the mine, and answered such inquiries, but kept silence with respect to the detrimental facts known to them. Payment having been made for the mine to the proprietor, 250 fully paid-up shares out of those received from the company were transferred by him to the defendants, and were subsequently sold, and the proceeds received by them. This transaction was not disclosed to the company.

In an action to recover the proceeds as secret profits made by promoters, the judge left the question of promotorship, without any definition, to the jury, who found that the defendants were promoters, and gave a verdict for the plaintiff:

*Held*, that there was ample evidence for the jury, and that the learned judge was not bound to give them a definition of the term "promoter;" that it has no very definite meaning, but involves the idea of exertion for the purpose of floating a company, and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it; and that the defendants were in a fiduciary relation to the company, and therefore liable to refund the secret profits, even although the contract of sale was not rescinded. *Emma Silver Mining Co. v. Lewis*. 619, 631 note.

*See* CORPORATIONS.  
STOCKHOLDERS, 156.

## DISTRESS.

1. By an agreement in writing the plaintiff hired from F. rooms in a house held by her under an unexpired lease from the defendant, for which the plaintiff was to pay F. £27 10s. per quarter, she paying rates and taxes, and keeping the premises in repair. The rooms so hired by the plaintiff substantially constituted the whole house, F. only retaining possession of the housekeeper's room on the basement and of two or three empty attics and a stable. Rent being due from F. to the defendant, the latter distrained and sold household furniture belonging to the plaintiff, who, relying upon the provisions of the Lodgers' Goods Protection Act, 1871, sued him for an illegal distress:

*Held*, that, although the agreement under which he held might make him an "undertenant," the plaintiff was not the less a "lodger" entitled to the protection of the statute. *Phillips v. Henson*. 19

*See* LANDLORD AND TENANT, 595.

## DIVORCE.

*See* HUSBAND AND WIFE, 241, 249 *note*.

## DOMICILE.

*See* JURISDICTION, 18.  
RESIDENCE, 702, 707 *note*.

## E.

## EASEMENT.

1. The access of air to the chimneys of a building cannot, as against the occupier of neighboring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under the Prescription Act (2 & 3 Wm. 4, c. 71).
2. The plaintiff and the defendants were occupiers of adjoining houses. For

more than twenty years the occupiers of the plaintiff's house had enjoyed the access of air to the chimneys of it. The defendants took down their house, and rebuilt a wall to a greater height, thereby causing the plaintiff's chimneys to smoke:

*Held*, that no action was maintainable by the plaintiff against the defendants, either on the ground that the plaintiff had acquired an easement which the defendants had interfered with, or on the ground that the nuisance complained of had been created by the defendants. *Bryant v. Lefever*. 474.

## ELECTION.

*See* RESIDENCE, 702, 707 *note*.

## ELECTIONS, PUBLIC.

1. In order to disqualify a candidate from being registered as a voter, by reason of personal bribery, or bribery by an agent with his knowledge and consent, under 31 & 32 Vict. c. 125, s. 43, he must be *found* by the report of the election judge under s. 11, subs. 14, to have been so guilty; it is not enough that the judge states facts from which personal bribery or other corrupt practices might be inferred. *Grant v. Overseers*. 53

2. By the Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 4, every officer, clerk, and agent in attendance at a polling-station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate before the poll is closed to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station.

An information was laid against the respondent under the above section, charging that he, being a personating agent duly appointed and in attendance at a certain polling-station in connection with a municipal election for a town councillor, did not then and there maintain and aid in maintaining the

secrecy of the voting in such station, but did then and there communicate before the poll was closed to a certain person or persons certain information as to the names and numbers on the register of voters of certain electors who had and had not applied for ballot papers or voted at that election. It appeared that the respondent, having been appointed personating agent, as stated in the information, attended at the polling booth with a copy of the burgess-roll, and remained there some hours placing a mark against the name of each voter who obtained a ballot paper, and then before the close of the poll left the station taking with him his copy of the burgess-roll, which he left in the committee room of the candidate by whom he was employed. There was no proof that the copy of the burgess-roll was seen by any person while in the room:

*Held*, that there was not sufficient evidence to warrant a conviction under the above section, as there was no proof that the information as to the voters was actually communicated to any person, and it was not enough that the means of acquiring such information were afforded to any one.

3. *Quære*, whether, under 11 & 12 Vict. c. 43, the information was defective as being for more than one offence? *Stannought v. Hazeldine*. 486

#### ESTOPPEL.

1. H., a merchant dealing in tobacco and a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the K. dock. The warrants for them had been issued to him. The plaintiff bought the tobacco from H. and paid for it, but he left the dock warrants in the possession of H., and took no steps to have any change made in the books of the dock company as to the ownership of the tobacco. H. being the ostensible owner of the tobacco fraudulently obtained advances on the pledge of a portion of the tobacco from the defendants respectively, and handed to them the dock warrants. Both the defendants acted in good faith, and took fresh dock warrants from the dock company:

*Held*, that H. was not intrusted by the plaintiff as his factor or agent with the documents of title, within 6 Geo. 4, c. 94, s. 2; and that the conduct of the plaintiff, in leaving the indicia of title in H.'s hands and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover its value from the defendants. *Johnson v. Credit Lyonnais Co.* 19, 36 note.

2. A tenant for life without leasing power demised a plot of building land for the term of sixty years, from the 29th of September, 1834, at the annual rent of sixpence; the lease contained a covenant by the tenant for life for quiet enjoyment. The lessee accordingly erected a house on the plot of land. After the death of the tenant for life the fee simple ultimately vested in H., who accepted rent at the rate above mentioned from J., who was a son of the original lessee, and was then in possession of the house. H. afterwards conveyed the house and land to the plaintiff by indenture: the grant was made expressly subject to the supposed term of sixty years. No notice to quit had been given, and the annual value of the house and land was about £8. The plaintiff having sued to recover possession of the house and land:

*Held*, that as the representatives of the original lessee, under the indenture of the 29th of September, 1834, could not have sued H. for breach of the covenant for quiet enjoyment, the void lease afforded no defence against the plaintiff claiming under the grant of the fee simple subject to it; that a tenancy from year to year had not been created by the payment of rent at the rate of sixpence a year: and that the plaintiff was entitled to immediate possession of the house and land. *Smith v. Widdlake*. 10, 17 note.

#### EVIDENCE.

1. In an action against a company to recover a sum of money obtained by them from the plaintiff, through a fraud of the defendants' agent committed with their knowledge and for their benefit, evidence of similar frauds committed on persons other than the plaintiff, by

the same agent, in the same manner, with the knowledge, and for the benefit, of the defendants is admissible on behalf of the plaintiff. *Blake v. Albion, etc.* 417

2. Proceedings by guardians of the poor before justices against a husband, to compel him to maintain a child which, although born of his wife in wedlock, he refuses to maintain on the ground that he is not its father, are not "proceedings instituted in consequence of adultery," within the meaning of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, so as to make his evidence admissible to prove non-access to his wife, and thereby bastardize the child. *Guardians v. Tompkinson.* 585, 598 note.

See BASTARDY, 562 and note.  
INTERROGATORIES, 701.

### EXCISE.

1. The defendant, a person licensed to sell beer not to be drunk on the premises, sold beer to Y., who brought a jug for it and carried it across the highway to the cottage of one S., about fourteen yards from the defendant's premises, and handed the jug to S., who was standing in his own garden. S., having drunk some of the beer, returned the jug over the wall to Y. and others, who also drank of it standing on the pathway close to the wall. The jug was refilled two or three times, and the beer drunk in the same way. The defendant received the money for the beer on each occasion, and saw or might have seen what was going on:

*Held*, that this evidence did not justify a conviction of the defendant under 35 & 36 Vict. c. 94, s. 5, for permitting drinking "on the premises where the beer was sold, or on any highway adjoining or near such premises, with the privity or consent of the seller." *Bath v. White.* 91

2. P. gave a dinner to some friends at a licensed house kept by L. On the breaking up of P.'s party, L. invited nine of P.'s guests, including the appellant, to remain after the hour for closing, to partake of two bottles of

claret at his (L.'s) expense. Upon an information charging these nine persons with being found on the premises during prohibited hours, the justices, though satisfied of the *bona fides* of the transaction, convicted them under s. 25 of the Licensing Act, 1872, on the ground that the landlord, on the arrival of the hour for closing, could not convert them into "private friends," for the purpose of their consuming the wine so supplied to them by him:

*Held*, that the conviction was right. *Corbel v. Haigh.* 701

### EXECUTION.

See ATTACHMENT, 440, 442 note.

### EXECUTORS AND ADMINISTRATORS.

1. The priority which a judgment creditor is entitled to in the administration of the assets of a deceased person under a decree in an administration suit, is not affected by s. 10 of the Judicature Act, 1875, whether such judgment be registered or not. *Smith v. Morgan.* 825, 827 note.

See SET-OFF, 382.

### F.

#### FACTOR.

See ESTOPPEL, 19, 36 note.

### FEEES.

See SHERIFF, 112, 117 note.

### FENCES.

1. A railway company let surplus land to a tenant, separating it from the ad-

joining land not taken by means of an open post-and-rail fence four feet high. The tenant planted his land with vegetables. Horses kept on the adjoining land of the defendant, by reason of the insufficiency of the fence passed their heads through and over it and did damage to the tenant's crops:

*Held*, that, the duty of fencing being by 8 & 9 Vict. c. 20, s. 68, imposed upon the railway company, the defendant was not responsible to their tenant for the trespass of his cattle. *Wise-man v. Booker*. 95

### FIXTURES.

1. An underlease of a nursery ground contained an express covenant by the underlessee to deliver up all landlord's fixtures thereon at the end of the term :

*Held*, that a representation and covenant by the grantors of the underlease that the underlessee should be at liberty, without hindrance from any one, to remove trade fixtures during the term, and that the grantors had not entered into covenants inconsistent with such right, could not be implied. *Porter v. Drew*. 738

### FORGERY.

1. Sect. 12 of the Crossed Checks Act, 1876 (39 & 40 Vict. c. 81), exonerates a banker from all liability to the true owner of a check crossed in blank,—that is, with the words "and company" or an abbreviation thereof between two parallel transverse lines, or two parallel transverse lines simply, but without the words "not negotiable,"—where the banker has *bona fide*, in the usual course of business, and without negligence, received payment of it for a customer, notwithstanding any defect in the title of the latter, whether by reason of a forgery of the indorsement or otherwise. *Matthieson v. London, etc*. 678, 687 note.

### FRAUD.

1. Where an order under 3 & 4 Wm. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57,

s. 1, for the conveyance of a married woman's interest in property bequeathed to her has been obtained by fraud or the suppression of facts which ought to have been disclosed at the time,—the court will set it aside: but a clear case must be made out. *Matter of Cockerell*, 891, 392 note.

2. Evidence of other similar transactions admissible by same agent, in same manner, with knowledge and for benefit of defendants, admissible. *Blake v. Albion*. 417

*See* COMPOSITION, 607, 611 note.

### FRAUDS, STATUTE OF.

*See* PRINCIPAL AND AGENT, 659, 665 note.

### FRAUDULENT TRANSFERS.

*See* CHATTEL MORTGAGES, 794, 803, 805 note, 843.

### FREIGHT.

*See* ADMIRALTY, 578.

### G.

#### GAS COMPANY.

*See* NEGLIGENCE, 564, 567 note.  
WATERWORKS, 634.

### H.

#### HIGHWAYS.

1. The appellant employed on a highway a traction engine drawing two wagons for the carriage of materials and goods used for ordinary purposes on his estate (the engine being of less weight than was allowed by s. 28 of the High-

ways and Locomotives (Amendment) Act, 1878, and having its wheels constructed in accordance with the provisions of that section), and thereby did damage to the highway beyond that caused by the ordinary wear and tear:

*Held*, that this was "excessive weight" and "extraordinary traffic," the damage caused by which was properly chargeable upon the appellant under s. 23 of the act. *Aveland v. Lucas*.

840

### HUSBAND AND WIFE.

1. The husband of a married woman must be joined with her as a defendant in an action to charge wages and earnings which are her separate property under 33 & 34 Vict. c. 93 (The Married Women's Property Act, 1870). *Hancock v. Lablache*. 100, 104 note.

2. A solicitor employed by a wife to take proceedings against her husband to obtain a divorce on the ground of cruelty and adultery, may sue the husband for "extra costs," i.e., costs reasonably incurred by him beyond the costs taxed and allowed as between party and party.

His common law right to sue the husband as for "necessaries" supplied to the wife, is not to be limited to the statutable rights and remedies for costs given to the wife under the Divorce Acts. *Ottaway v. Hamillon*. 241, 249 note.

*See* BASTARDY, 562 and note.

EVIDENCE, 585, 593 note.

LEX LOCI, 595.

MARRIED WOMEN.

### I.

### INFANTS.

1. The Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2, providing that "no action shall be brought whereby to charge any person upon . . . any ratification made after full age of any promise or contract made during infancy . . ." applies to promise of marriage.

The defendant, during his infancy, promised to marry the plaintiff, and, after coming of age, recognized without expressly repeating the promise, and eventually broke it.

The plaintiff sued him for the breach, and was nonsuited:

*Held*, that the nonsuit was right; for, assuming that there was a ratification of the promise subsequent to his majority, the right of action upon such ratification was taken away by the above section, and there was no evidence of any fresh promise made after the defendant came of age. *Coxhead v. Mullis*. 255

2. The defendant during his infancy made an offer of marriage to the plaintiff, which she accepted subject to the approval of his parents. He afterwards gave her an engaged ring, which she wore; and two days before he attained his majority he went into the country to visit his father, and on his return (the day after he came of age) he saw the plaintiff and told her that he had explained all to his father, and that he assented to the engagement,—adding, "Now I may and will marry you as soon as I can."

*Held*, that it was properly left to the jury to say whether this was a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy, so as to be avoided by the operation of the Infants Relief Act, 37 & 38 Vict. c. 62, s. 2. *Northcote v. Doughty*. 612, 617 note.

### INJUNCTION.

1. The court has power to issue an injunction to restrain a defendant from publishing of the plaintiff, to the injury of his trade, matter which a jury have found to be libellous.

2. *Semble*, that this power may be exercised by the judge who tries the cause. *Sazby v. Easterbrook*. 209, 213 note

*See* LANDLORD AND TENANT, 595.

STAY, 828.

### INNOCENT PERSON.

*See* ESTOPPEL, 19, 36 note.

INSURANCE, MARINE.

1. Where the assured receives full and reliable information that the subject matter of the insurance is in imminent danger of becoming a total loss, he is bound, in order to enable him to recover as for a constructive total loss, immediately to give notice of abandonment to the underwriter, and his omission to do so will not be excused because afterwards the subject-matter of the insurance is justifiably sold. *Kaltenbach v. McKenzie*. 310

2. The defendants, a fire insurance corporation, agreed to reinsure the plaintiffs, a marine insurance company, against loss by fire up to £1,000 by any one vessel upon all coal-laden ships insured by the plaintiffs at and from certain ports to others. A policy was accordingly subscribed by the defendants, whereby in consideration of £250 they undertook to reinsure the plaintiffs against loss or damage by fire to the extent of £50,000 by the ships as might be declared at and from certain ports to others; the policy to be subject to the same clauses and conditions (as far as they related to fire risk only) as the original policy or policies, and would pay as might be paid thereon. The policy provided that the arrangement was to be in force for a year, and include only coal-laden vessels, and the policy was to be supplemented by further policies on like terms should the amount of it not prove sufficient for the year's transactions. This and a second policy being exhausted by declarations of risk made under them, a third policy was applied for by the plaintiffs and issued to them. A risk, incurred prior to the date of the second policy, was not included in those declarations and was followed by a loss of cargo from fire known to the plaintiffs when the third policy issued, but, through mere neglect on the part of their manager, was not declared until afterwards. Taken in chronological order, this risk came under the third policy, if any.

In an action to recover for the loss, the court, empowered to decide all questions in the case:

*Held*, that although the defendants had reinsured against fire only, their agreement was in respect of a marine risk and subject to the usage of un-

derwriters stated in *Stephens v. Australasian Insurance Co.* (Law Rep., 8 C. P., 18), and that, therefore, the policies attached to the goods in order of shipment, and the declarations must be rectified to make them correspond with it, and this might be done even after loss; that the negligence of the plaintiffs' manager did not deprive them of their right to do it, and consequently that they were entitled to recover. *Imperial, etc., v. Fire, etc.* 468

3. The plaintiff agreed with one W. for a sum of £10,000 to transport the obelisk known as "Cleopatra's Needle" from Alexandria to London, and there to erect it upon some public site to be afterwards selected. He accordingly placed it in an iron case which he named The Cleopatra, shaped somewhat like a ship, with a small deck and a mast and steering apparatus, and engaged a steam vessel called the Olga to tow it to England. To cover the expenses (about £4,000) incurred by him in getting the obelisk afloat, and the cost and risk of the voyage to England, the plaintiff caused two policies to be effected with the respective defendants "upon the goods and merchandises in the good ship or vessel called The Cleopatra iron vessel containing the obelisk . . . valued at £4,000 . . . against the risk of total loss only;" the risks insured against being the ordinary sea risks, and the suing and laboring clause being in the ordinary form.

In the course of the voyage The Cleopatra got adrift in a storm in the Bay of Biscay, and the Olga after some ineffectual attempts to recover her proceeded to England without her. The Cleopatra was ultimately picked up by another steamer and carried into Ferrol, where the salvors detained her under a claim for salvage. A suit was afterwards instituted by the salvors in the Admiralty Court, London, in which they claimed £25,000 for salvage services. The court awarded them £2,000 and costs.

In actions upon the policies:

*Held*.—1. That the plaintiff, being the owner of The Cleopatra, and having possession of the obelisk, and (possibly) a lien upon it for his expenditure, had a sufficient insurable interest, at least to the extent of his outlay:

2. That the true effect of both poli-

cies was, an insurance, not on "cargo" or "freight" only, but on the vessel and her cargo:

3. That, under the suing and laboring clause, the assured was entitled to recover the £2,000 awarded to the salvors, but not the costs of the proceedings in the Admiralty Court, nor the expenses incurred by him in refitting *The Cleopatra* at Ferrol and towing her to London. *Dixon v. Whitworth*. 600

### INTERPLEADER.

1. S. was the agent of L., a wine merchant in Spain, and was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, and sent the bills of lading to S.: the bills of lading were handed by S. to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with the defendants, a dock company, who issued warrants for the same: some of the wine therein mentioned was made deliverable to the order of one of the three persons, and the rest to the order of another of them. The warrants were then pledged with the plaintiffs to secure advances. L. afterwards served notice upon the defendants not to part with the wine: thereupon the defendants refused to give up the wine when it was demanded of them by the plaintiffs, who commenced actions claiming damages in addition to the value of the wines:

*Held*, reversing the decision of the High Court of Justice, that the defendants were entitled to an interpleader order under 1 & 2 Wm. 4, c. 58, s. 1, and the Common Law Procedure Act, 1860, s. 12, for the right to the wine might be determined as between the plaintiffs and L., and the actions might be stayed as to that, and might be continued as to the claims for damages, and by issuing the dock warrants the defendants had not debarred themselves from obtaining relief under those statutes.

2. *Held*, also, that as the wine had been obtained by fraud from S., the agent of L., with a power to sell, the property

in it passed to the three persons, who before the fraudulent contract was annulled could confer a title upon the plaintiffs, and that L. must be barred upon the plaintiffs undertaking to account to him for the value of the wine after deducting their advances. *Allenborough v. St Katharines*, etc. 295, *Reversing* 236

### INTERROGATORIES.

1. The plaintiffs claimed £1,732 10s., the price of three horses alleged to have been sold by them to the defendant. By his statement of defence the defendant denied that the horses were sold to him, and further alleged that the prices charged were excessive, and that the horses were ordered by his wife without any authority to pledge his credit for them. Reply, that the horses were necessities suitable to the estate and degree of the wife.

The following interrogatories were administered to the plaintiffs:

1. State the date when you purchased each of the horses alleged by you to have been sold to the defendant on, &c.

2. State, if you did in fact purchase each or any of the said horses, and were in fact the owner of the same, when, as you allege, you sold them to the defendant.

3. Give the exact amount you paid or had contracted to pay for each of the said horses.

4. If you were not the owners of the said horses or any of them at the date when, as you allege, you sold them to the defendant, state specifically and in detail how and under what circumstances you had each and every of the said horses in your custody, possession, or control.

5. State specifically and in detail the date or dates upon which you received the said horses into your control.

*Held*, that the 1st and 3d interrogatories were relevant and material to the issues, and ought to be answered; but that the 2d, 4th and 5th were inadmissible. *Sheward v. Lonsdale*. 701

### INTOXICATION.

*See* EXCISE, 91.



J.

JOINT DEBTORS.

See MERGER, 250, 256 note.

JUDGMENTS.

See EXECUTORS AND ADMINISTRATORS, 826,  
827 note.  
MERGER, 250, 256 note

JURISDICTION.

1. The South Eastern Railway Company have a station in Cannon Street, City, where a considerable portion of their business is transacted. Their principal station, where the meetings of the directors are held and the general and substantial business of the company is conducted, is without the city:

*Held*, that the company do not "carry on business" within the jurisdiction of the Mayor's Court, within the meaning of s. 12 of the Mayor's Court Extension Act, 1857. *Le Tuillieur v. South Eastern, etc.* 18

2. Under ss. 89 and 90 of the Judicature Act, 1873, an inferior court has jurisdiction to entertain a claim set up by way of counter-claim, although it is in respect of matters which arose beyond its local jurisdiction; but the power to grant relief in respect of such counter-claim is limited to the same amount which the plaintiff has claimed in the action. *Davis v. Flagstaff, etc.* 125

See SERVICE, 417.

L.

LANDLORD AND TENANT.

1. *Prima facie* the landlord is the person liable to the outgoing tenant, at the expiration of his tenancy, for the seeds, tillages, &c., properly bestowed by him upon a farm.

2. Although, therefore, the ordinary practice (to avoid circuity) is, for the incoming tenant to pay the outgoing tenant for the seeds, tillages, &c., upon a valuation made between them; yet an alleged custom or usage that the outgoing tenant shall look to the incoming tenant for payment, to the exclusion of the landlord's liability, cannot be supported. *Bradburn v. Foley.* 65

3. A six months' notice to determine a yearly tenancy commencing on one of the ordinary Feast-days, means a "customary six months," that is, from one of the usual quarter-days to the quarter-day next but one following, though such six months should exceed or fall short of the number of days which constitute half a year. Consequently, a notice served on the 26th of March, to quit on the 29th of September then next, is not a valid notice. *Morgan v. Davies.* 151

4. A yearly tenancy which by express agreement of the parties is determinable on six months' notice to quit is not within the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51, which provides that "Where a half year's notice, expiring with the year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this act be necessary and sufficient for the same." *Wilkinson v. Calvert.* 229

5. Under a demise of premises for twenty-one years, the lessee covenanted to pay the rent reserved "without any deduction or abatement except land tax and landlord's property tax," and further "to pay and discharge all and all manner of taxes, rates, charges, assessments, and impositions whatever (except as aforesaid) then or at any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of Parliament or otherwise howsoever."

During the term the lessor received from the sanitary authority a notice, pursuant to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94, to abate a nuisance injurious to health arising from the bad condition of the drains upon the premises, and in order

to prevent proceedings against him, executed the required works:

*Held*,—upon the authority of *Tidwell v. Whitworth* (Law Rep., 2 C. P., 326),—that, the payment having been made by the lessor, not for a "rate, charge, assessment, or imposition assessed or imposed on the denised premises or in respect thereof," but in performance of a duty imposed upon him by the act of Parliament, he was not entitled to call upon the lessee under his covenant to repay the amount. *Rawlings v. Briggs*. 281, 236 note.

6. An injunction, to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms and conditions as the court shall think just," under the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 8.

7. The terms and conditions which the court thought just and imposed on tenants, who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only if the rent was in the meantime paid into court. *Shaw v. Earl of Jersey*. 596

See DAMAGES, 487.  
DISTRESS, 19.  
FIXTURES, 783.  
TAXES, 596.

## LEASE.

See DAMAGES, 487.

## LEGACY.

1. Testator bequeathed to his niece L. B. "the mortgage of £200 which he had secured to him on a mortgage of premises (describing them) belonging to W. H." After the making of the will and before the testator's death, the mortgage debt due to him from W. H. had been paid off:

*Held*, that the specific bequest to L. B. was adeemed, and that the fact of

the testator having placed the £200 to a separate account at his banker's, and put the pass-book in which that sum was credited to him in her hands made no difference. *Matter of Bridle*. 579

## LETTERS.

See AGREEMENTS, 833, 839 note.

## LEVY.

See ATTACHMENT, 440, 442 note

## LEX LOCI.

1. By the law of Jersey a husband is liable for the ante-nuptial debts of his wife, and the Married Women's Property Act, 1870, Amendment Act, 1874 (37 & 38 Vict. c. 50), does not apply to Jersey:

*Held*, notwithstanding, that an Englishman married in England, after the passing of the act, to a woman who has contracted debts while a *feme sole* in Jersey, is liable, in an action brought against them in England for those debts, to the extent only of the assets derived from his wife and specified in s. 5 of the act. *Greuchey v. Wills*. 595

## LIBEL.

See DEFAMATION.  
PLEADINGS, 435.

## LICENSE.

See EXCISE, 701.

## LIGHT.

See EASEMENT, 474.

LIMITATIONS, STATUTE OF.

1. In May, 1874, the defendant, in answer to a demand of a debt incurred by him in 1865, wrote to the plaintiffs as follows,—“Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments.” It was admitted that in one year since 1874 the defendant's income had been £14 more than it was and since had been :

*Held*, that, assuming the letter to amount to such an acknowledgment as to warrant the inference of a promise to pay, it was a conditional promise only, and there was no affirmative proof of the substantial fulfilment of the condition. *Meyerhoff v. Froehlich*. 200, 206 note.

2. In May, 1874, the defendant, in answer to a demand of a debt incurred by him, wrote to the plaintiffs as follows: “I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments.” In September, 1876, he again wrote: “Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living.” At the trial the defendant admitted that in one year since 1874 his income was greater by £14 than it had been in that year; but no proof was adduced that the “general commercial crisis” alluded to in the defendant's letter of September, 1876, had given way:

*Held*, affirming the judgment of Denman, J., that if the defendant's letters constituted such acknowledgments as to warrant the inference of promises to pay, they were conditional promises only, and there was no proof of the substantial fulfilment of the conditions. *Meyerhoff v. Froehlich*. 413

LIQUORS.

*See EXCISE*, 91.

M.

MALICIOUS PROSECUTION.

*See PLEADINGS*, 435.

MARRIED WOMEN.

1. A., a butcher (not within the city of London), in consequence of confirmed intemperance, became incapable of continuing his business, and was removed to the workhouse infirmary suffering from delirium tremens. On his removal, a friend at various times lent his wife sums of money to enable her to purchase meat wherewith to carry on the business for the support of her family. She continued to do so for several months, her husband on his return from the infirmary never in any way interfering, but residing for part of the time in an upper room of the house. Meat which had been so purchased by the wife was seized in execution for a debt of the husband; and upon an interpleader summons the county court judge came to the conclusion,—whether as matter of law or of fact did not appear,—that the case was not within the Married Woman's Property Act, 1870. Upon appeal to a divisional court, it being agreed that the court should draw inferences from the facts stated by the judge:

*Held*, that the case disclosed such a separate trading by the wife as to warrant them in holding that the goods seized were the property of the wife. *Lovell v. Newton*. 369

*See FRAUD*, 391, 392 note.

HUSBAND AND WIFE, 100, 104 note.

MASTER AND SERVANT.

1. The defendants were brewers, having upon the river T. a wharf, where coals were discharged to be used in their business. The plaintiff was hired by A., to assist in unloading a barge at the wharf of the defendants. The plaintiff and A., with other men, formed a gang, the members of which were paid by the defendants, at the rate of 1s. 9d. for every ton of coals discharged; one of the men was to receive from the defendants the money due for unloading the barge and to distribute payment amongst them; the defendants alone had power to dismiss the plaintiff. Whilst the plaintiff was engaged in unloading the barge, a servant of the defendants, who was engaged in moving some barrels, negligently let one

of them slip upon an upraised flap, which fell and caused the plaintiff injury. The plaintiff had frequently been at the spot when the barrels were being moved:

*Held*, that the defendants were not liable to compensate the plaintiff for the injury sustained by him; for A. held the position of a foreman and not of a contractor, and the plaintiff was servant to the defendants, and he was engaged in a common employment with the servant, by whose negligence the injury happened, and there was no concealed danger. *Charles v. Taylor*. 331, 337 note.

2. Claim alleged that the servant of the plaintiff took a ticket and travelled by the L. T. & S. Railway; that the defendants, the Great Eastern Railway Company, supplied the engines, drivers and firemen for working the traffic of the L. T. & S. Railway, and also the signalmen for working the said traffic at the S. Junction; that the L. T. & S. train in which the servant travelled came into collision with a train of the defendant company at the junction, through the negligence of the defendants' signalman there; that the servant was hurt, whereby the plaintiff lost his services and was damnified. On demurrer:

*Held*, that the action was against independent wrongdoers, not parties to the contract of carriage, for a pure tort, and could therefore be maintained. *Berringer v. Great Eastern, etc.* 466

#### MERGER.

1. Before the coming into operation of the Judicature Acts, 1873, 1875, at common law a judgment recovered against one joint contractor was a bar to a subsequent action against any other joint contractor; and in equity, although upon the death of a partner his estate might become subject to a several liability, yet during the lifetime of the partners the legal effect and incidents of a contract entered into by the partnership remained unaltered; and therefore since the coming into operation of the Judicature Acts, 1873, 1875, a contractee, who has obtained judgment against one member of a

partnership for breach of a contract entered into by it, cannot maintain an action in respect of the same breach against another member of the partnership.

The defendant was interested in a contract made by the plaintiffs with the firm of W. & Co., and as to the contract was in the position of a dormant partner with respect to that firm. The plaintiffs obtained judgments against the members of the firm of W. & Co. other than the defendant in respect of breaches of that contract, and after the coming into operation of the Judicature Acts, 1873, 1875, commenced the present action against the defendant alone for certain sums of money, which were included in the judgments obtained by them against the firm of W. & Co.:

*Held*, that the cause of action against the defendant was merged in the judgments obtained against the members of the firm of W. & Co., and that the present action was not maintainable. *Kendall v. Hamilton*. 250, 256 note.

#### MISTAKE.

*See* PAYMENT, 46, 198.

TELEGRAPH COMPANY, 1, 9 note.

#### MONEY HAD AND RECEIVED.

*See* PAYMENT, 46, 198.

#### MONEY PAID.

*See* PAYMENT, 46, 198.

#### MUNICIPAL CORPORATIONS.

1. Under a local act incorporating the provisions of the Public Health Acts, 1848 and 1858, by-laws were made, by which it was amongst other things provided that "every person who shall intend to erect any new building shall give a week's notice to the town surveyor of such intention, by writing de-

livered to the surveyor or left at his office, and shall at the same time leave at the office detail plans and sections of every floor of such intended new building." &c ; and a penalty not exceeding £5 is imposed for non-compliance with this requirement.

The appellant, without giving such notice or delivering any plans, erected certain structures which from their description could not be intended for residential purposes, and which were found by the justices, upon a case stated under 20 & 21 Vict. c. 43, to have been erected for a temporary purpose only, and to have been intended to be pulled down by the appellant when that purpose was answered:

*Held*, that a conviction under the above mentioned by-laws could not be sustained, inasmuch as such by-laws, if intended to apply to such structures, were unreasonable and bad.

3. By the local act (passed in 1847) the commissioners were empowered to make by-laws, which were to be published by being printed and a copy delivered to every person applying for the same, and by painting or placing on boards to be hung up on the front of the office of the commissioners, and also on some conspicuous part of the works or locality to which the same related. Under the Public Health Acts, 1848 and 1858, the prescribed mode of publication of by-laws is by "printing and hanging the same up in the office of the local board."

*Held*, that a publication in the manner prescribed by the last mentioned acts was sufficient. *Fielding v. Rhyl Improvement, etc.* 155

4. By s. 174 of 38 & 39 Vict. c. 55, every contract made by an urban authority whereby the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority.

The defendants, an urban authority, verbally directed their surveyor to employ the plaintiff to prepare plans for offices. The plans were prepared by the plaintiff, and the defendants advertised for tenders for building the offices in accordance therewith, but when these were sent in, it was found that the plaintiff's plans were upon too expensive a scale, and the intended offices were not erected. There was no ratifi-

cation under seal of the act of the plaintiff's surveyor in procuring the plans. At the trial the jury found that offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the erection of the buildings for which they were designed, and that the cost of the plans was £94 :

*Held*, that, assuming the contract was founded on an executed consideration, the plaintiff could not recover, for s. 174 was imperative, and not directory, and applied to every contract for a sum exceeding £50 entered into by an urban authority.

5. *Semble*, that, as the plaintiff's plans did not enable the defendants to erect the offices required by them, they had not derived such a benefit as would entitle the plaintiff to sue upon an executed consideration. *Hunt v. Wimbledon Local Board.* 400

## N.

### NAVIGABLE RIVERS.

1. The plaintiff was lord of a manor held under grants giving him the right of fishery in all the waters of the manor, and, consequently, in a river running through it. Some manor land on one side of, and near but not adjoining, the river, was enfranchised and became the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there:

*Held*, that an action of trespass against him for so doing could be maintained by the plaintiff, who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on to the defendant's land. *Foster v. Wright* 648, 659 *note*.

## NAVIGATION.

1. 22 & 23 Vict. c. cxxxiii: An act for the Better Regulation of the Barge Owners and others connected with the Navigation of the River Thames between Teddington Lock and Lower Hope's Point, by s. lxvi, enacts that no barge or other like craft for the carrying of goods shall be "worked or navigated" within the limits of the act, unless there be "in charge of such craft" a lighterman licensed or apprentice qualified as therein mentioned.

Six barges fastened together in pairs were towed by a steam-tug on the river within the limits of the act. Four men were in charge, but no one was on board either of the two last barges:

*Held*, that the two barges were "worked or navigated" in contravention of the act, which required a qualified person to be on board each barge to manage it, in case of separation or accident. *Elmore v. Hunter.* 58

## NEGLIGENCE.

1. The plaintiff and the defendants respectively occupied adjoining lands as tenants under the same landlord. By the terms of their lease the defendants were bound to fence the land in their occupation for the benefit of the lessor and his tenants. About twenty years ago the predecessors of the defendants had fenced their land with wire rope, and the defendants allowed this fence to remain, and from time to time partially repaired it. From long exposure the strands of the wires composing the rope decayed, and pieces of it fell to the ground and lay hidden in the grass of the adjoining pasture occupied by the plaintiff. The plaintiff's cow grazing there swallowed one of these pieces, and died in consequence:

*Held*, that the defendants were liable to compensate the plaintiff for the loss of the cow. *Firth v. Bowling, etc.* 146

2. The defendants, who were both the highway and the sewer authorities of West Derby, employed a contractor to construct a pipe-sewer under a highway within their district. The contractor in laying the pipes dug a trench, which

he afterwards filled in with earth, and the roadway was apparently made good. The work was done under the directions and to the satisfaction of the defendants' surveyor. Some months after it was finished, a subsidence of the soil in the trench took place without any assignable cause, leaving the road apparently sound. The plaintiffs' horse, in consequence of the surface giving way, fell into the trench, and was injured:

*Held*, that there was evidence that the work of filling in the trench had been negligently and improperly done, and that the defendants,—either as the sewer or the highway authority, or as both,—were responsible.

3. The notice of action (under 11 & 12 Vict. c. 63), s. 139, stated that the plaintiffs intended to enter a plaint against the defendants for the injury and damage caused to them through the defendants by matters or things done or omitted by them and their laborers and servants, &c., to wit, that they did, by themselves, their laborers and servants, "negligently, carelessly, and improperly leave a certain portion of the highway in an insufficient and improper state of repair, whereby," &c.:

*Held*, that this was a sufficient intimation to the defendants that they were to be charged with an act of misfeasance, and not merely with a neglect of duty to repair the road. *Smith v. West Derby, etc.* 271

4. The plaintiff, who held a mortgage for £4,600 upon lands belonging to one F., agreed to make him a further advance of £400 upon having an additional piece of land, which F. had subsequently acquired, added to the former security. The defendant, who acted as the plaintiff's solicitor in the transaction, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of £46 upon this additional piece of land; in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying the £46:

*Held*, that this was negligence for which the defendant was liable; and that, in the absence of evidence to reduce the amount, the £46 so paid was the proper measure of damages. *Whiteman v. Hawkins.* 375, 381 *note*.

5. Carrier liable for negligently stowing sugar, so it was injured by oxide of zinc. *Hayn v. Culliford*. 483

6. The defendant, a gas-fitter, was employed by the plaintiff's master to repair a gas-meter upon his premises, and for the purpose of doing so took away the meter and in lieu of it made a temporary connection by means of a flexible tube between the inlet pipe and the pipe communicating with the house. The plaintiff having gone in the ordinary performance of his duty with a light into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded and injured him.

The jury found that the work had been negligently done, and that the injury to the plaintiff proceeded entirely from such negligence:

*Held*, that the defendant was liable. *Parry v. Smith*. 564, 567 note.

*See* ADMIRALTY, 260, 267.

DAMAGES, 769.

MASTER AND SERVANT, 331, 337 note.

RAILWAYS, 740, 752 note.

TELEGRAPH COMPANY, 1, 9 note.

WATER AND WATERCOURSES, 81, 87 note.

## NOTICE.

*See* INSURANCE, MARINE, 310.

LANDLORD AND TENANT, 151, 229.

STOCKHOLDERS, 156.

## NUISANCE.

*See* EASEMENT, 474.

WATER AND WATERCOURSES, 81, 87 note.

## O.

### OFFICER.

*See* REWARD, 360, 365 note.

## ONUS.

*See* PARTNERSHIP, 493, 501 note.

30 ENG. REP.

## ORDINANCES.

*See* MUNICIPAL CORPORATIONS, 155.

## P.

### PARTICULARS, BILL OF.

*See* BILL OF PARTICULARS.

## PARTIES.

*See* HUSBAND AND WIFE, 100, 104 note.

## PARTNERSHIP.

1. If the name of a partnership firm be merely the name of an individual partner, proof that he signed such name to a bill of exchange is not enough to make the firm liable on the bill. To establish the liability, the holder of the bill must further prove that the signature was put to it by the authority and for the purposes of the firm. *Yorkshire, etc. v. Beatson*. 493, 501 note.

2. Where a signature is common to an individual and a firm of which the individual is a member, a *bona fide* holder for value, without notice whose paper it is, of a bill of exchange with such signature attached, has not an option to sue either the individual or the firm. But there is a presumption that the bill was given for the firm and is binding upon it, at least, where the individual carries on no business separate from the business of the firm of which he is a member: this presumption, however, may be rebutted by proof that the bill was signed not in the name of the partnership but of the individual for his private purposes, and is immaterial that the *bona fide* holder took the bill as the bill of the proprietors of the business carried on by the partnership whoever they might be, and not merely as the bill of the individual.

B. & M. carried on business in partnership. M. was a dormant partner, and B. was the only ostensible partner,

the business being carried on in his name alone. B. entered into accommodation transactions for his private purposes, and, without the authority of M., accepted and indorsed bills of exchange in his own name only. B. in becoming party to these bills, did not intend to bind M., but he considered the bills as private transactions and signed them merely on his own behalf. The plaintiffs became *bona fide* holders for value of the bills signed by B., and took the bills as the bills of the proprietors of the business carried on by the partnership and not merely as the bills of B. Besides the business of the partnership B. was not engaged in any business:

*Held*, affirming the judgment of the Common Pleas Division, that the plaintiffs could not hold M. liable upon the bills accepted and indorsed by B. *Yorkshire Banking Co. v. Beaton*, 709, 726 note.

See MERGER, 250, 256 note.

## PASSENGERS.

See RAILWAYS, 277, 284 note.

## PAYMENT.

1. The plaintiff obtained from the defendants an advance of £15,000 upon the security of goods then in transit to Monte Video consigned to one S., and of six bills of exchange drawn by the plaintiff upon and accepted by S. against the shipments. Two of these bills were duly paid; but, other two having been dishonored, the defendants (at Monte Video) proposed to realize the goods at once, whereupon the plaintiff handed them a check for £2,500, accompanied by a letter requesting them not to sell, and authorizing them to hold the £2,500 as collateral security for S.'s acceptances, to be returned to the plaintiff when all the bills should have been paid. The remaining bills having also been dishonored by S., the defendants took proceedings against him at Monte Video, which resulted in a judicial arrangement under which the goods were sold, and the bills were delivered up to S. cancelled without the knowledge

or consent of the plaintiff. The sale of the goods did not produce sufficient even with the £2,500, to pay all the bills.

In an action by the plaintiff against the defendants to recover back the £2,500:

*Held*, that, notwithstanding the effect of the cancellation of the bills was to discharge both the plaintiff and S. from all liability on the bills, and also to deprive the plaintiff, as drawer, of all remedy upon them against S. as acceptor, the circumstances under which such cancellation took place was not equivalent to payment of the bills in full; and, consequently, that the plaintiff was not entitled to call upon the defendants to refund the £2,500, or any part of it. *Yglesias v. Mercantile Bank*. 46

2. The plaintiff obtained from the defendants an advance of £15,000 upon the security of goods then in transit to Monte Video consigned to one S., and also of six bills of exchange drawn by the plaintiff upon and accepted by S., against the shipments. The plaintiff authorized the defendants, on the non-payment of the bills, to realize the goods, and held himself responsible for any deficiency. Two of these bills were duly paid; but other two having been dishonored, the defendants (at Monte Video) proposed to realize the goods at once, whereupon the plaintiff gave them a check for £2,500 accompanied by a letter requesting them not to sell, and authorizing them to hold the £2,500 as collateral security for S.'s acceptance to be returned to the plaintiff when all the bills should have been paid. The remaining bills having also been dishonored by S., the defendants took proceedings against him at Monte Video, which resulted in a judicial arrangement under which the goods were sold and the bills were delivered up to S. cancelled, without the knowledge or consent of the plaintiff. The sale of the goods did not produce sufficient, even with the £2,500, to pay all the bills. In an action by the plaintiff against the defendants to recover back the £2,500:

*Held*, affirming the judgment of the Common Pleas Division, that the plaintiff was the principal in the transaction, and as the bills had been dishonored and there was a deficiency after



realizing the goods, it was immaterial that S. had been discharged from liability upon the bills, and the defendants were not bound to refund the £2,500. *Yglesias v. Mercantile Bank.* 198

## PENALTY.

*See* CORPORATIONS, 237.

## PERFORMANCE.

1. The plaintiffs contracted to sell to the defendants twenty-five tons (more or less) Penang pepper, October *and/or* November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading.

Within the stipulated time the plaintiffs declared twenty-five tons by a vessel called the B., only twenty tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper:

*Held* (by Cotton and Thesiger, L.JJ., Brett, L.J., dissenting), that the contract was entire, and that the defendants were not bound to accept the twenty tons, but were entitled to insist upon the delivery of twenty-five tons according to the contract. *Reuter v. Sala.* 518, 535 note.

*See* REWARD, 360, 365 note.  
TITLE, 350.

## PLEADINGS.

1. A claim alleged that the defendant wrote and sent to a chief constable letters charging the plaintiff with a murder, and required his arrest: also, that the defendant sent to a superintendent of police charging the plaintiff with the murder, and required his arrest; and that the superintendent, in consequence, endeavored to arrest the plaintiff on several occasions, but was unable to meet with him; that the defendant had no reasonable or probable cause for

making the charge, and the same was false, and made maliciously and with intent to injure the plaintiff, whose credit and reputation were thereby injured.

On demurrer:

*Held*, that the claim was bad; because, if it was for libel or slander, the defamatory words were not set out, as, even in pleading under the Judicature Act, they ought to be; if for malicious prosecution, none had been instituted before a judicial officer. *Harris v. Warre.* 435

## PLEDGE.

*See* PAYMENT, 46.

## PRESUMPTION.

*See* PARTNERSHIP, 493, 501 note.

## PRINCIPAL AND AGENT.

1. The defendant, an estate agent, contracted to sell land to the plaintiff, who paid a deposit. The defendant signed a receipt in his own name for the deposit, and the plaintiff signed an agreement containing the terms of the purchase. The owner of the land refused to complete the purchase, and the plaintiff sued the defendant for damages for breach of the contract to sell. At the trial the jury found that the defendant sold as principal:

*Held*, that the defendant was personally liable, and that the agreement and receipt taken together formed a sufficient contract to satisfy the Statute of Frauds, s. 4. *Long v. Millar.* 659, 665 note.

2. By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary who was also acting treasurer; the usual course of business was that he delivered to the lenders a receipt and undertaking on behalf of the directors to give promissory notes signed by the

directors, and subsequently exchanged such notes for the receipt and undertaking. After a total amount had been borrowed exceeding that limited by the rules, the plaintiffs paid a sum to the secretary as a loan to the society, and received from him the usual receipt and undertaking, but no promissory notes. This sum he appropriated to his own use. In an action against the society and directors the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the directors did the same:

*Held*, by Lord Coleridge, C.J., that although money had been borrowed in excess of the total amount limited by the rules, and they might therefore afford protection to the society or its members as between themselves and the directors, yet that the society and directors having for a purpose legal in itself authorized the loan made by the plaintiffs were both liable to them.  
*Chapleo v. Brunswick, etc.* 820,  
825 *note*.

*See* ADMIRALTY, 550, 752.

CORPORATIONS, 106.

ESTOPPEL, 19, 36 *note*.

MASTER AND SERVANT, 331, 337 *note*.  
SET-OFF, 694.

TENDER, 447.

## PRINCIPAL AND SURETY.

*See* PAYMENT, 46, 198.

## Q.

## QUANTUM MERUIT.

*See* AGREEMENTS, 400.

## R.

## RAILWAYS.

1. A by-law of a railway company provided that "any passenger travelling

without a ticket, or failing or refusing to show or deliver up his ticket" to any duly authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey."

*Held*, that, as against a passenger who had, in good faith, travelled a short distance upon the line without having procured a ticket, this by-law was unreasonable, and void,—inasmuch as it was in substance an attempt to inflict a penalty for doing without fraud that which, by the joint operation of ss. 103 and 109 of 8 Vict. c. 20, can be punished only if done fraudulently.  
*London, etc., v. Watson.* 277, 284 *note*.

2. A by-law of a railway company provided that "any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket" to any duly authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey."

By s. 109 of the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), by-laws are authorized to be made, and by s. 145 penalties for forfeitures imposed by by-laws are recoverable before justices:

*Held*, that the above by-law did not create a debt recoverable in a court of civil jurisdiction. *London, etc., v. Watson.* 433, 435 *note*.

3. Outside the cover of a paper book of coupons forming a railway ticket, issued to the plaintiff by the defendants, was printed the name of their railway, the words "Cheap return ticket, London to Paris and back, Second class," and a statement of the period and journey for which the ticket was available, but no reference to the inside of the cover. On the inside, and apparent on turning the leaf, was a condition limiting the responsibility of the defendants to their own trains.

The plaintiff having been injured while travelling by virtue of the ticket, in a French train, sued the defendants. They set up the condition. The plaintiff had not read and did not know of it.

The jury were directed that if it was brought to his notice it would afford a defence, and, on being asked the

question, suggested in *Parker v. South Eastern Ry. Co.* (2 C. P. D., 416; 21 Eng. R., 349), whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff, answered that it was not, and found a verdict in his favor. He moved for judgment.

*Held*, distinguishing *Henderson v. Stevenson* (L. R., 2 H. L. (Sc.), 470), that the whole book was the contract accepted by the plaintiff, and that he, therefore, could not reject the condition which was one of its terms, and that judgment should be entered for the defendants. *Burke v. South Eastern, etc.* 671, 676 note.

4. The defendants, a railway company, had running powers between H., a station upon their own line, and R., a station of the S. company, over the line of that company. The defendants and the S. company divided the profits of the traffic between H. and R. The plaintiff took a return ticket from R. to H., which was issued to him by a clerk of the S. company. Upon the return journey from H. to R. he travelled in a train belonging to the defendants, and driven by their servants. Owing to the carriage being unsuited to the platform at R., which belonged to the S. company, the plaintiff sustained bodily injury. At the trial the jury found that the defendants had been guilty of negligence:

*Held*, that an action lay against the defendants, for they, having permitted the plaintiff to travel by their train, were bound to make provision for his safety. *Foulkes v. Metropolitan, etc.* 740, 752 note.

See CARRIERS, 117, 123 note, 536, 550 note.

FENCES, 95.

## RATIFICATION.

See INFANT, 285, 612, 617 note.

## REGISTER.

See NEGLIGENCE, 375, 381 note.

## RENT.

See DISTRESS, 19.

LANDLORD AND TENANT, 595.

## RESCISSION.

See TITLE, 350.

## RESIDENCE.

1. By 2 & 3 Wm. 4, c. 45, s. 81, which makes provision for freeholders voting for a city being a county of itself, no freeholder shall be registered in any year "unless he shall have resided for six calendar months next previous" to a certain day in such year, within such city.

During part of the prescribed period of six months, a freeholder who had a bedroom kept for his exclusive use in his father's house within such a city was absent, serving under articles to a solicitor in London:

*Held*, that, being bound by the articles, he could not be deemed to have had either the liberty or intention to return to the room whenever he liked, and therefore had not "resided" within the city for the required time within the meaning of the act. *Ford v. Drew.* 702, 707 note.

See JURISDICTION, 18.

ABATEMENT, 393, 399 note.

## REWARD.

1. G., having been guilty of forgery, absconded. The defendants published a hand bill offering a reward of £200 "to any person or persons giving such information to A., superintendent of police, Dewsbury, or to H., superintendent of police, Wakefield, as will lead to the apprehension of the said G."

On the 30th of November, 1877, a person presented himself at the police office, Exeter, and asked for the chief constable (the plaintiff). On seeing him, the man (who was G.) said, "You hold a warrant for me; I am wanted for forgery." The plaintiff left the man

in a private room, and, on searching the police gazette and finding a notice therein, "W. G. wanted for forgery," telegraphed to the superintendent of police at Dewsbury, "Do you hold warrant for the apprehension of W. G. for forgery?" Receiving an answer, "I still hold warrant for G., and should like him to be apprehended," the plaintiff *apprehended* and charged the man, who was ultimately convicted.

In answer to questions left to them, the jury found that G. was not in custody before the telegram was sent; but they were unable to agree as to whether or not he had given his name before it was sent:

*Held*, that the plaintiff was not entitled to claim the reward,—the apprehension of G. not being the consequence of the plaintiff's information, but of the criminal surrendering himself to justice. *Bent v. Wakefield, etc.* 360, 365 note.

## RIVERS.

*See* NAVIGABLE RIVERS, 648, 659 note.

## S.

### SALES.

1. A horse was sold by the plaintiff to the defendant upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:

*Held*, by Denman, J., that the plaintiff could not maintain an action for the price, as for goods sold and delivered. *Elphick v. Barnes.* 810, 815 note.

*See* CHATTEL MORTGAGES, 794, 803, 805 note, 843.

PERFORMANCE, 518, 535 note.

TITLE, 350.

## SALVAGE.

*See* INSURANCE, MARINE, 600.

## SECURITY FOR COSTS.

1. Security for costs, where the plaintiff has become bankrupt or has filed a petition for liquidation, is not necessarily confined to *future* costs, but may, when applied for promptly, be extended to costs already incurred in the suit. *Brocklebank v. Lynn, etc.* 229
2. Where a litigant who resides abroad is for mere convenience made plaintiff in an interpleader issue, but does not substantially occupy the position of the plaintiff commencing an action, he will not be ordered to give security for costs. *Belmonte v. Aynard.* 503
3. Where one of the defendants in an interpleader issue is really interested in the result thereof as a plaintiff, he is not entitled to call upon the plaintiff in the issue to give security for costs upon the ground that the latter is a foreigner residing abroad. *Belmonte v. Aynard.* 593

## SENTENCE.

*See* CRIMINAL LAW, 507, 512 note.

## SERVICE.

1. To obtain leave to serve a defendant in Scotland, it is not enough to show the amount of the claim, that the contract was made and the breach of it occurred in London, that the plaintiff and also the agent of the defendant (who signed the contract) reside in London, that all the plaintiff's witnesses reside in London, and that it would be more convenient and less expensive to try the action in London than in Scotland. The affidavit should go on to show in what respect, regard being had to the facilities for trying the cause in the neighborhood of the defendant's residence, it would be cheaper

and more convenient to try in London.  
*Woods v. M'Innes.* 417

SET-OFF.

1. A defendant must not set up by way of counter-claim against the claim of a plaintiff, suing only in a distinct personal character, claims against him personally and also as an executor. *Macdonald v. Currington.* 382
2. In an action by the assignee of a policy of insurance, the insurers are entitled, by virtue of 31 & 32 Vict. c. 86, s. 1, to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured prior to the date of the assignment. *Pellas v. Neptune, etc.* 443
3. In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set-off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment; for the claim under a policy for a loss is for unliquidated damages to which no set-off could be pleaded at law under the Statutes of Set-off in an action by the assured, nor in equity in a suit by the assignee, and therefore the debt incurred by the assured is not a "defence" open to the insurers under 31 & 32 Vict. c. 86, s. 1, that statute being intended merely to amend procedure and not to alter the rights of the parties to the policy; nor is the debt incurred by the assured the subject of "set-off" or "counter-claim" within the meaning of the Rules of the Supreme Court, Order xix, rule 3. *Pellas v. Neptune, etc.* 694

SHERIFF.

1. A sheriff, who by compulsion of a writ of fi. fa., recovers the amount of a judgment debt, is entitled to poundage, although after seizure he is paid out by the execution debtor, without a sale of any portion of the goods seized. *Mortimore v. Cragg.* 112, 117 note.

See ATTACHMENT, 440, 442 note.  
REWARD, 360, 365 note.

SHIPS.

See ADMIRALTY.  
BILLS OF SALE, 139.  
NAVIGATION, 58.

SLANDER.

See DEFAMATION.  
PLEADINGS, 435.

SLANDER OF TRADE.

See INJUNCTION, 209, 213 note.

SPECIFIC PERFORMANCE.

See COVENANTS, 38, 46 note.

STAY.

1. The recovery of costs payable under an order will not be stayed pending an appeal to the House of Lords, if the solicitors to whom they are payable give their personal undertaking to refund in case of the order being reversed.  
Payment of costs will not be stayed on the ground that another proceeding in the same action is pending under which costs may become payable to the applicant. *Grant v. Banque, etc.* 105
2. Thirty-eight actions having been brought by different persons against the defendants as directors of an incorporated company, charging misappropriation of moneys advanced by the plaintiffs in different amounts and at different times, but all under similar circumstances:  
*Held*, upon the authority of *Amos v. Chadwick* (4 Ch. D., 869, and 9 Ch. D., 459; 26 Eng. R., 243), that it was competent to a judge at chambers, upon the application of the plaintiffs, to stay the proceedings in thirty-seven of the actions until after the trial of the thirty-eighth as a test action,—proper provision being made in case that action did not satisfactorily dispose of the question in all. *Bennett v. Bury.* 828

## STOCKHOLDERS.

1. The principle of *Onkes v. Turquand* (Law Rep., 2 H. L., 325), extends to the voluntary winding up of a company formed under the Companies Acts, 1862 and 1867. Where, therefore, a company, its assets being insufficient to meet its liabilities, is voluntarily wound up, a shareholder in such company, who has been induced to take shares by the fraudulent representation of its directors, cannot repudiate his shares, nor seek to rescind a contract in respect of them, nor can he recover back from the company money paid by him for the shares.

The notice to the shareholders convening the meeting at which an extraordinary resolution was passed to wind up a bank voluntarily and appoint a liquidator (in which was embodied an agreement by the directors with B. & Co., a London banking firm, to transfer to the latter all the assets of the bank upon their undertaking the debts and liabilities of the bank, not including any claims of shareholders to have money repaid to them on the ground of fraud), was in the words of s. 129, clause 3, of the Companies Act, 1862:

*Held*, by Lindley, J., that the notice was sufficient and the resolution binding on all the shareholders of the bank (under s. 136), whether they were present and voted for it or not.

2. By the agreement referred to in the above resolution it was provided, amongst other things, that B. & Co. should pay all the debts and liabilities of the bank, and should indemnify the bank and the shareholders against the same; that the whole assets of the bank, "including under such term the uncalled capital and any arrears of calls already made," should be transferred by the bank to B. & Co., who should be empowered to collect and get in all the said assets of the bank; and that the bank should admit B. & Co. as creditors against the bank in respect of all payments made by them to or on behalf of the bank:

*Held*, by Bramwell, Brett, and Cotton, L.JJ., in the Court of Appeal, affirming the judgment of Lindley, J., that the effect of this arrangement was to keep alive the debts and liabilities as against the bank, and in favor of

B. & Co., to the extent necessary to entitle the latter to recoup themselves, in respect of their payments, out of the assets of the bank, including its uncalled capital.

3. By the articles of association of the bank every shareholder was required to pay calls to the person and at the time and place appointed by the directors; and twenty-one days' notice was to be given of the time and place appointed. By a resolution of the directors before a voluntary winding up, they made a call payable by instalments at certain dates, but no place or person at which or to whom the call was to be paid was mentioned, and no notice of the call was given by the directors; after the winding up the liquidator gave notice to the shareholders that a call had been made, and requested them to pay it to certain persons at a specified place and time:

*Held*, by Bramwell, Brett, and Cotton, L.JJ., in the Court of Appeal, affirming the judgment of Lindley, J., that the liquidator had power to enforce the call made by the directors, and that the notice given by him was sufficient under the Companies Act, 1862, s. 95, clauses 4 and 8, and s. 133, clauses 5 and 7. *Stone v. City, etc.* 156, 187 note.

4. A railway company was incorporated by a special act passed in June, 1866, in which T. and A. were nominated directors, until the first ordinary meeting of the company, and which provided also that the qualification of a director should be the possession of fifty shares. In August, 1866, T. sent in his resignation as director, and S. was informally appointed director in his stead, and thenceforward continued to act as such. T. took no part in the affairs of the company, never applied for any shares, none were allotted to him, and although calls were made, no notice thereof was given to him. A. acted as director until December, 1867, when he also resigned his directorship; shortly afterwards B., who had not previously acted as a director, and whose name was not in the special act, attended the meetings of the board as director. No shares were ever allotted to A. No first ordinary meeting of the company was ever held. After the resignations of T. and A. an informal register of shareholders was drawn up, from which

it appeared that the whole number of shares constituting the capital of the company had been allotted to other persons than T. and A. After the resignations of T. and A. the railway company became indebted to the D. Banking Company. In February, 1876, the plaintiff as public officer obtained judgment against the railway company for £18,000, and in November issued execution against them; the execution being unsatisfied, he issued, in July, 1877, writs of scire facias upon the judgment against T. and A. as holders severally of fifty shares in the railway company:

*Held*, that the writs of scire facias could not be maintained against T. and A., for it was to be inferred from the facts above stated that the railway company had accepted from T. and A. a surrender of the inchoate right to shares which they possessed under the special act; that the evidence of an acceptance of the surrender of an inchoate right need not be as express as would be required in the case of the surrender of specific shares actually allotted; and that the lapse of years, during which the railway company had not treated T. and A. as shareholders, was strong evidence that they had abandoned all rights against them; and that, the plaintiff's causes of action having accrued since their resignations, T. and A. were not estopped as against him from denying their liability as shareholders; and that he could not be in a better position as regarded them than the railway company. *Kippling v. Todd.* 220

*See* DIRECTORS, 619, 631 *note*.

#### SUFFER.

*See* ESTOPPEL, 19, 86 *note*.

#### SURFACE WATER.

*See* WATER AND WATERCOURSES, 81, 87 *note*.

#### SURVIVOR.

*See* ABATEMENT, 393, 399 *note*.

EXECUTORS AND ADMINISTRATORS, 827 *note*.

PARTNERSHIP, 709, 726 *note*.

30 ENG. REP.

#### T.

##### TACKING.

*See* CHATTEL MORTGAGE, 763.

##### TAXES.

1. The defendant became tenant of a house under a lease by which he covenanted to pay "all rates, taxes, charges, and assessments whatsoever which now are or may be charged or assessed upon the said premises, or any part thereof, or upon any person or persons in respect thereof," land tax and property tax excepted. The local board of health gave notice to the plaintiff, as owner (he having acquired the lessor's interest in the premises), to sewer, level, pave, &c., the street in which the house was situate; and, upon his failure to comply with the notice, the board did the work, and made an apportionment upon him in respect thereof, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the acts amending that act, and he was compelled to pay the amount and interest:

*Held*, that this was a "charge upon the premises," or "upon a person in respect thereof," from which by his covenant the defendant undertook to relieve the plaintiff, and therefore the plaintiff was entitled to maintain an action against the defendant in respect of the money and interest so paid by him. *Hartley v. Hudson.* 596

*See* LANDLORD AND TENANT, 231.

##### TELEGRAMS.

*See* AGREEMENTS, 833, 839 *note*.

##### TELEGRAPH COMPANY.

1. The defendants, a telegram company, through the negligence of their servants delivered to the plaintiffs a message which was not intended for them. The plaintiffs, who reasonably supposed that the message came from their

agents and was intended for them, acted upon it and thereby incurred a loss:

*Held*, affirming the decision of the Common Pleas Division, that the plaintiffs could not maintain any action against the defendants upon the ground of their negligence, or of an implied representation by them that the message was sent by the plaintiffs' agents. *Dickson v. Reuter's Telegram Co.* 1,

9 note.

### TENDER.

1. Money payable as a composition on a sum due to a solicitor for costs was tendered to a clerk in his office, who, saying that the solicitor was out, and that he, the clerk, had "no instructions," refused the money:

*Held*, per Lord Coleridge, C.J., that the clerk's statement did not amount to a disclaimer of his authority to receive the money; as he was apparently conducting his master's business in the office, such authority might be implied; and, therefore, the tender was good:

2. Per Denman, J., that the statement was, in effect, a disclaimer of authority; the case was, therefore, indistinguishable from *Bingham v. Allport* (1 Nev. & M., 398), and the tender was bad. *Fritch v. Boning.* 447

### TIME.

*See CRIMINAL LAW*, 507, 512 note.  
*DAY*, 54, 57 note.

### TITLE.

1. The plaintiffs, being under contract to sell wagons, employed L. to make them according to sample at a certain price. L. then employed the defendant wagon company to make them according to sample at a lower price. The company afterwards proposed to receive payment direct from the plaintiffs, who consented and were authorized by L. to pay them. Some wagons were delivered by the wagon company to the defendant railway company to the order of the plaintiffs. The plaintiffs sent a

complaint to the wagon company that the wagons were unequal to sample, but did not reject them; and they informed L., and also the wagon company, that they would dispose of the wagons at the best price obtainable, and hold L. responsible for loss. L. rejected the wagons. The plaintiffs gave notice to the railway company not to deliver the wagons without their order, but the railway company nevertheless delivered them to the wagon company, who refused to give them up. In an action against both companies for conversion:

*Held* (1.) That, the property in the goods and the right to possession of them having passed to the plaintiffs, both defendants were liable:

(2.) That the arrangement for the advantage of the wagon company, that they should receive direct payment from the plaintiffs, had not created any relationship between them which would prevent the application of the ordinary rule as to the measure of damages in trover against mere strangers; and that the plaintiffs were, therefore, entitled to recover the full value of the goods at the time of the conversion, without deduction of the price. *Johnson v. Lancashire, &c.* 350

*See INTERPLEADER*, 236, 295.  
*SALES*, 810, 815 note.

### TORTS.

*See HUSBAND AND WIFE*, 100, 104 note.

### TRESPASS.

*See NEGLIGENCE*, 146.  
*TITLE*, 350.

### TROVER.

*See TITLE*, 350.

### TRUSTS AND TRUSTEES.

*See CHATTEL MORTGAGES*, 794, 803, 805 note.  
*DIRECTORS*, 619, 631 note.



## U.

## ULTRA VIRES.

*See* AGREEMENT, 400.

## USAGE.

*See* LANDLORD AND TENANT, 65.

## V.

## VENDOR AND VENDEE.

*See* COVENANTS, 38, 46 *note*.  
ESTOPPEL, 10, 17 *note*.  
TITLE, 350.

## VESSELS.

*See* ADMIRALTY.  
BILLS OF SALE, 139.

## VIS MAJOR.

*See* ADMIRALTY, 289.

## VOTERS.

*See* ELECTIONS, PUBLIC, 53.

## W.

## WARRANTY.

*See* ADMIRALTY, 77.  
TELEGRAPH COMPANY, 1, 9 *note*.

## WATER AND WATERCOURSES.

1. A statement of claim alleged that the surface of the defendants' land had

been artificially raised by earth placed thereon, and that in consequence rain water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage:

*Held*, upon demurrer, that the statement of claim disclosed a good cause of action. *Hurdman v. North Eastern, etc.* 81, 87 *note*.

## WATERWORKS.

1. A tenant of premises supplied by a company with water having failed to pay the water-rate, the company under the powers conferred upon them by s. 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), severed the communication with their main pipes. A subsequent tenant demanded a supply of water for the same premises, tendering to the company the current quarter's rate and the estimated expense of restoring the communication, but the company refused to supply the water until the arrears due from the former tenant were paid. A magistrate having convicted the company under s. 43 of the Waterworks Clauses Act for such refusal:

*Held*, that, although the company were not warranted in refusing to supply water to the incoming tenant until the arrears due to them as above stated were paid, they could not be made liable to the penalties imposed by s. 43 until he himself had restored the communication with their main pipes. *Sheffield, etc., v. Wilkinson.* 634

## WILLS.

1. A will by which the testator said, "I give and bequeath unto my wife my household goods" (and personality of various kinds particularly specified), continued, "and all other my personal estate *property* chattels and effects whatsoever and wheresoever to which I am now *seised* possessed or entitled to or may hereafter acquire and can hereby dispose of to hold the same unto my said wife, her executors, administrators and assigns for her and their own use and benefit absolutely."

Then followed a formal "devise" of real estate vested in him by way of mortgage in fee, and also of his trust estates to his wife and brother their "heirs and assigns" upon the trusts affecting the same estates respectively:

*Held*, that the word "personal" controlled the subsequent general words of the gift to the wife, and that real estates of which the testator died seised as absolute owner did not pass by the will. *Jones v. Robinson*. 215

"Extraordinary traffic," 649  
 "Lodger," 19  
 "Navigated," 55  
 "Personal," 215  
 "Persons," 237  
 "Under tenant," 19  
 "Worked and navigated," 58

#### WRITING.

*See* MUNICIPAL CORPORATIONS, 400.

#### WITNESS.

*See* BASTARDY, 562 and note.

#### WORDS.

"All rates, taxes," etc. 506  
 "Excessive weight," 840

#### WRONGDOERS.

1. When two railway companies are independent wrongdoers, and each liable, though one not party to contract for carrying passenger. *Berringer v. Great Eastern, etc.* 466

# INDEX TO NOTES.

---

## A.

**Abatement**, actions for personal injuries do not survive party inflicting injuries, **30—399.**

“ action against plumber for injury from negligence, abates with death of person injured, **30—570.**  
See *Survivors.*

“**About**,” meaning of, **30—535.**

**Acceptance.** See *Agreements.*

**Accord and Satisfaction.** See *Satisfaction.*

**Accretion**, law of, **30—659.**

**Adverse Possession**, effect of, on deed by infant, **30—618.**

**After-acquired Property.** See *Chattel Mortgages.*

**After-acquired Title.** See *Covenant.*

**Agent.** See *Principal and Agent.*

**Agreements**, minds of parties must meet, **30—819.**

“ sold as “first class,” those words omitted in bought and sold note, **30—819.**

“ though if substantially agree, sufficient, **30—819.**

“ one received and appropriated property, knew other party understood sold, **30—819.**

“ if acceptance absolute, expression of hope does not prevent agreement, **30—81.**

“ effect of mutual misunderstanding, where seller used property, **30—81.**

“ when no contract until delivery and approval, though delivery of papers obtained, **30—81.**

“ not sufficient to prove handwriting that received in answer to telegram, **30—839.**

“ telegram sufficient to comply with statute of frauds, **30—839.**

“ if proposition written and acceptance oral, contract is oral, **30—839.**

“ one directed another if couldn't get better terms to accept, and did so orally, **30—839.**

“ acceptance sent by mail, when insufficient, **30—839.**

“ acceptance contained condition vendor did not accede to, **30—839.**

“ when letter sufficient acceptance, **30—839.**

“ when within proper time, **30—839.**

**Agreements—continued.**

- " offer subject to acceptance by telegraph, and if not sent by certain time to be regarded as "no," 30—839.
- " when valid, though not reduced to writing, 30—839.

See *Frauds, Statute of—Master and Servant—Reward.*

**Alluvion, law of, 30—659.****Arbitration, clause in insurance policy will arbitrate upon, "written request," verbal insufficient, 30—464.**

- " if dispute, to be referred to arbitrator, cannot sue without offer to arbitrate, 30—464.
- " when certificate architect conclusive, 30—465.
- " molasses to be guaged by St. John guage; not by correct guage, 30—465.
- " if conversation about certificate, proper certificate admissible, 30—465.
- " architect not to settle whether extra work or not, where stipulation to leave dispute as to value to him, 30—465.
- " stipulate to leave to architect ousts court of jurisdiction, 30—465.
- " agreement to leave quantity and value of work to engineer of railway, 30—465.
- " though not as to work not done under contract, 30—465.
- " umpire must re-hear parties on notice, 30—465.

**Architect. See Arbitration.****Assent, minds of parties must meet, 30—819.**

- " "first class" omitted, 30—819.
- " sufficient, 30—819.

See *Agreements.*

**Assignee, of mortgage, takes subject to equity, 30—37.**

- " if takes on faith of mortgagor, he is estopped as to subsequent title, 30—38.

**Assignment, after attachment, assignee takes subject to it, 30—57.**

See *Stockholders.*

**Attachment, assignee after, takes subject to, 30—57.**

- " of moneys in hands of sheriff, 30—442.
- " such moneys may be attached, 30—442.
- " what sufficient levy, 30—442.
- " funds in receiver's hands cannot be attached, 30—443.
- " so moneys in hands of executors and administrators, 30—443.

**Attorney, when attorney liable to sheriff for fees on an execution, 30—117.**

- " negligence in searching, 30—381-2.
- " in investment, 30—382.
- " in not recording mortgage, 30—382.
- " in managing suit, 30—382.
- " legacy to, presumptively void, 30—633.
- " good if understandingly made, 30—633.
- " lien as against trust estate, 30—633.

See *Husband and Wife.*

**Auctioneer. See Frauds, Statute of.****B.****Baggage. See Carriers.****Bailment, liability of stakeholder receiving reward to be paid over on receipt of stolen records; were damaged when returned, 30—368.****Bank. See Forgery.**

**Bankruptcy**, requisites of binding new promise, 30—207.  
 “ effect of subsequent judgment on claim barred, 30—257.  
 “ relief, how obtained, 30—257.

**Bastardy.** See *Evidence*.

**Bill of Particulars**, power of court to order, 30—692.  
 “ office of, 30—692.  
 “ when may be ordered, 30—692-3.  
 “ when will not be, 30—693.  
 “ party applying, knowing facts, 30—693.  
 “ when cannot assume party does, 30—693.  
 “ allegations as to special damages, 30—693.  
 “ when cannot furnish from loss of books, etc., 30—693.  
 “ adding “as per agreement,” no agreement shown, 30—694.  
 “ when sufficiently definite, 30—694.  
 “ remedy if not, 30—694.  
 “ if does not furnish, court may order complaint stricken out, 30—694.

**Bills of Exchange.** See *Forgery*.

**Bills of Sale.** See *Chattel Mortgages*.

**Bona fide**, if one, having no title, makes mortgage and subsequently acquires one, subsequent purchaser not chargeable with constructive notice of mortgage, 30—18.  
 “ one furnishing another with evidence of title or authority, to suffer rather than innocent person, 30—36.  
 “ furnishing one with evidence title to stocks, 30—36.  
 “ so with blank power of attorney, 30—36.  
 “ so with broker who pledges, 30—36.  
 “ if has assignment absolute in form, small consideration no notice title qualified, 30—37.  
 “ agent, after had borrowed all authorized, borrowed more under apparent authority, 30—37.  
 “ one perpetrating fraud with papers; which party held to act for, in particular case, 30—37.  
 “ if assignee takes mortgage on faith of mortgagor, latter estopped from asserting subsequent title, 30—38.  
 “ purchaser of bonds from trustee, 30—632.  
 “ purchaser on precedent debt, 30—632.  
 “ what purchaser must allege and prove, 30—633.  
 “ holder of forged note transferred collateral, 30—688.  
 “ rights of holder of paper where agent issued more than authorized to, 30—825.

See *Chattel Mortgages—Mortgage—Partnership—Sales—Stockholders—Trust and Trustees*.

**Broker.** See *Bona fide—Frauds, Statute of*.

## C.

**Carriers**, liability for baggage never delivered by passenger but retained in own custody, 30—123.  
 “ so ferryman, 30—123.  
 “ money of which passenger forcibly robbed by stranger entering cars, 30—123.  
 “ passenger left coat in seat, 30—123.  
 “ satchel so left came to employe's possession, 30—123.  
 “ wrongfully ejected, leaving article in seat; liability for article, 30—123.

**Carriers—continued.**

- " if baggage taken into passenger's possession, must take ordinary care of, **30—123.**
- " passenger failed to get into same car and portmanteau robbed, **30—123.**
- " liability of carrier for baggage kept in passenger's control, through negligence of carrier without passenger's fault, **30—124.**
- " passenger's car detached, so couldn't find it and baggage lost, **30—124.**
- " when no defence to carrier that it did not own sleeping car from which baggage lost, **30—124.**
- " liability of, for property stolen, not given to its care, **30—124.**
- " degree of care owner bound to exercise, **30—124.**
- " steamboat proprietor liable for property lost by one in charge of baggage, though not paid by it but by passenger, **30—124.**
- " liability of steamboat for watch stolen from under pillow, **30—124.**
- " baggage stolen from stateroom of ocean steamer, **30—124.**
- " stolen from stateroom domestic steamer, **30—125.**
- " owner did not check, but put where employe directed while getting ticket, etc., **30—125.**
- " guest at inn took to different room than own, where property exposed, **30—125.**
- " in landing, trunk sent by different tug than one passenger sent on, **30—125.**
- " liability on tickets for route over lines of connecting, **30—550.**
- " unless special contract, only extends over own route, **30—676.**
- " only liable for damage on own road, **30—676.**
- " fact joined in through fare does not change, **30—676.**
- " nor does fact that dispatch company gives receipt, **30—676.**
- " accepting goods with knowledge of destination not sufficient, **30—676.**
- " carrier liable though employs carriages of others, **30—676.**
- " when must be negligence of own servants and not those of others, **30—676.**
- " when not liable for loss from defective vehicle of others, **30—676.**
- " when liable for losses by others, **30—676.**
- " bound to carry for all without discrimination, **30—676.**
- " when words of restriction on ticket not binding on passenger, **30—677.**
- " when liable for animals burned from defective appliances, though contract restricted, **30—677.**
- " non-joinder of another negligent party, no defence, **30—677.**
- " when restricted contract legal, **30—677-8.**
- " when liable because carried animals beyond destination, so owner could not water, **30—678.**

*See Railways.*

- Chattel Mortgages**, on property to be acquired as between the parties, **30—805.**
- " " as between mortgagee and purchaser with notice, **30—805.**
  - " " though after-acquired property may pass, does so subject to rights of others—i.e., rescission on account of fraud, **30—806.**
  - " " whether on property to be acquired is valid, **30—806.**
  - " " difference of rule at law and in equity, **30—806.**
  - " " as to attaching and execution creditors, **30—806.**
  - " " crops sown, wool on sheep, etc., **30—806.**
  - " " crops to be sown, etc., **30—806-7.**
  - " " when vendor's taking possession renders valid, **30—807.**
  - " " vendor of land retaining lien on future crops for purchase money, **30—807.**

**Chattel Mortgages—continued.**

- " " sale of colts to be foaled, 30—807.
- " " railway mortgages upon property to be acquired, 30—807.
- " " upon enough of crop to make two bales of 500 pounds each, 30—807.
- " " when of "all property on Allen farm," what it covers, 30—807-8.
- " " on oats now "growing and standing," does not cover oats already cut, 30—808.
- " " if clause covering after-acquired property void, not so as to what has, 30—808.
- " " upon merchant's stock of goods and such as shall be added, 30—808.
- " " upon stock of goods with power to sell, 30—808.
- " " when assignee may avoid, 30—809.
- " " power to sell, but stock not to be reduced below \$6,000 in value, 30—809.
- " " mere fact mortgagor continues to sell without proof of mortgagee's assent, does not render void, 30—809.
- " " under mortgage with power to sell, mortgagee took possession with mortgagor's assent before creditor acquired lien, 30—809.
- " " though power to sell good as between the parties, 30—809.
- " " power to sell, net proceeds to be paid to mortgagee, 30—810.
- " " of logs to be sawed, and lumber to be delivered to mortgagee at certain price, 30—810.
- " " executed in one State, property taken to another, 30—818.
- " " sent out of State and proceeds of sale paid on debt, liability of creditor, 30—818.

**Check.** See *Forgery*.

**Clerk,** negligence in searching, not docketing judgment, etc., 30—881.

**Club.** See *Principal and Agent*.

**Collateral,** recovery on note not bar to foreclose mortgage security, 30—256.

**Compromise.** See *Fraud*.

**Conditional Sales.** See *Sales*.

**Conflict of Laws,** presumption that common law obtains in other states, 30—284.

**Constable.** See *Reward*.

**Contribution,** if survivor compelled to pay entire debt, may have contribution of representative of joint co-surety, 30—259.

**Conversion,** selling goods for another in good faith, 30—818.

**Convict,** liability to one injured, 30—337.  
See *Criminal Law*.

**Corporations.** See *Stockholders*.

**County,** liability to convict, 30—337.

**Covenant,** deed with warranty estops title subsequently acquired, 30—17.

" so in favor of subsequent grantee, 30—17.

" so on sale of interest in patent, 30—17.

" not however as against mortgagee on acquiring of second title, 30—17.

" though will, as to excess of value, 30—17.

" will not on mere quitclaim without covenant, 30—17.

" if covenant estops, 30—17.

**Covenant**—*continued*.

- " but if conveys merely "right, title and interest" of grantor instead of lands, warranty applies only to that, **30—17.**
- " and acquired title may be enforced, **30—17-8.**
- " if married woman joins husband in deed, does not extinguish mortgage held by her, **30—18.**
- " if assignee takes mortgage on faith of mortgagor, latter estopped from asserting after-acquired title, **30—36.**
- " when tenant enjoined from using for prohibited purpose, **30—46.**
- " when lease does not restrict to particular use, **30—46.**
- " effect of landlord covenanting not to let adjoining land for particular purpose and breach, **30—46.**

**Criminal Law**, whether sentence commences at imposition or actual incarceration, **30—512.**

- " " may be changed same term, if no part executed or satisfied, **30—512-3.**
- " " though not, if execution commenced or partly satisfied, **30—513.**
- " " imprisonment before sentence not allowed, **30—513.**
- " " though after conviction will, **30—513.**
- " " whether time at large on bail to be allowed, **30—513.**
- " " if escapes, must serve the unexpired term, though if had not escaped, sentence would have expired, **30—513-7.**
- " " if time of sentence elapses without imprisonment endured, prisoner may be brought before court and new date for its beginning fixed, **30—517.**
- " " remedy, if day for capital punishment passed without infliction, **30—517.**
- " " proceedings to enforce unsatisfied portion of escaped convict's punishment, **30—517.**
- " " rule in *New York* in such case, **30—517.**
- " " if prisoner escapes, court will not hear appeal or application in his behalf until he returns and places himself within jurisdiction of court, **30—518.**
- " " cumulative sentence may be imposed to commence at termination of prior one, **30—518.**
- " " one under conviction may be convicted of crime committed while under such conviction, **30—518.**

**Custom**, when proof of immaterial, **30—689.****D.****Damages**, only such as parties contemplated or may fairly supposed to have contemplated, **30—9.**

- " if depends on contingency of expected action of third person, too remote, **30—9.**
- " commissions broker would have earned, too remote, **30—9.**
- " from not repeating message, **30—9.**
- " against different parties polluting or using stream, **30—90.**
- " different parties excavating, **30—90.**
- " direct and remote, from negligence in making search, **30—381.**
- " owner of cattle cannot recover for injury thereto from drinking poisoned water, after he knew facts, **30—569.**
- " profits from failure to supply gas, **30—572.**

**Day**, law does not generally regard fractions of, **30—57.**

- " but courts will when justice requires, **30—57.**
- " constitution went into effect day of election, **30—57.**
- " in contest between attachment and assignment, **30—57.**
- " assignee after attachment, **30—57.**



**Debtor and Creditor.** See *Chattel Mortgages—Fraud.*

**Declarations.** See *Evidence.*

**Delivery**, when no contract, though delivery obtained, **30—819.**  
See *Carriers.*

**Demand**, on conditional sale, **30—815.** —

**Demurrer**, for improper joinder of survivor and representative of deceased, **30—258.**

**Direct Damages**, on negligence in making search, **30—381.**

**Disaffirmance.** See *Fraud—Infant.*

**Divorce.** See *Evidence.*

**Domicile.** See *Residence.*

**Drains.** See *Water and Watercourses.*

**Duty.** See *Master and Servant.*

**E.**

**Easement**, to take water for irrigation, **30—90.**

**Election.** See *Residence—Set-off.*

**Elections, Public.** See *Day.*

**Equity**, suit will not lie for negligence in investigating title, **30—382.**

**Escape.** See *Criminal Law.*

**Escrow**, subscription to stock so delivered, but voted on stock, **30—186.**

**Estoppel**, one not estopped by opinion of effect of writing about to execute, **30—18.**

“ if assignee takes mortgage on faith of mortgagor, estopped as to subsequent title, **30—38.**

“ as against infant, **30—619.**

“ married woman joined in deed of lands on which she held mortgage, **30—18.**

See *Covenant—Forgery—Married Woman—Mortgage—Stockholders.*

**Evidence**, engineer had threatened to run over brakeman, **30—343.**

“ if conversation about paper proper, paper admissible, **30—465.**

“ legitimacy presumed, **30—562.**

“ if opportunity for intercourse between husband and wife must be strong evidence to overcome presumption of intercourse and of legitimacy, **30—562.**

“ testimony of husband or wife inadmissible on question of intercourse, **30—562.**

“ limited divorce does not overcome presumption of intercourse if opportunity, **30—562.**

“ legal presumption of intercourse must be overcome by cogent evidence of non-access, **30—562.**

“ when declarations of mother admissible, **30—562.**

“ husband being dead, mother competent witness on question of legitimacy, **30—563.**

“ evidence of mother's bad character for chastity inadmissible, **30—563.**

“ bad character for truth admissible, **30—563.**

“ on question of paternity, *three months'* infant cannot be exhibited to jury, **30—563.**

“ but one *two years* old may, **30—563.**

“ on question of mixed blood may be exhibited, **30—563.**

“ whether evidence of personal resemblance admissible, **30—563.**

“ on trial for incest, intercourse with others immaterial, **30—563.**

**Evidence—continued.**

- " so her declarations as to such intercourse, 30—563.
- " in bastardy, evidence intercourse except within usual period of gestation inadmissible, unless proof child premature, 30—563.
- " how mother may be impeached in bastardy, 30—563.
- " paternity must be established beyond reasonable doubt, 30—563.
- " case where held not be so established, 30—564.
- " in seduction cannot, *to impeach*, ask whether had intercourse with other men, 30—564.
- " on question of paternity of child, may be, 30—564.
- " rule same as in bastardy, and intercourse with others during period of gestation proper, 30—564.
- " may prove putative father tried to settle and inquired about nurse, 30—564.
- " in abortion, defendant procured prosecutrix's statement he was not guilty, 30—564.
- " illness alleged from gas; evidence from other causes, 30—568.
- " injury from gas, proof as to trouble of digging in frozen earth 30—571.
- " may show plaintiff made no claim for long time, 30—571.
- " of injured person's declarations, 30—571.
- " belief defendant's agent as to injury not proper on question of care required, 30—571.
- " of agent's advice as to what to do, 30—571.
- " gas meter not inspected, 30—572-8.
- " that other similar machines did not work, 30—816, 817.
- " that one is man of careless business habits, 30—817.
- " "Terms cash" on unreceipted bill do not import paid for, 30—819.
- " when proof of handwriting not sufficiently proved by proof received in answer to dispatch, 30—839.

*See Gas Company—Parol Evidence.*

**Execution.** *See Attachment—Husband and Wife.***Executors and Administrators,** including own barred debt in inventory, 30—208.

- " " including debt in petition to sell realty, 30—208.
- " " directing attorney to pay out of certain fund, 30—208.
- " " promise by one of several, 30—208.
- " " fraud vitiates credit on an accounting, 30—393.
- " " how required to pay judgments against deceased, 30—259, 827.
- " " to what judgments statute applies, 30—259, 827.
- " " actions for personal injuries do not survive person inflicting injuries, 30—399.
- " " when allowed for improvements on real estate, 30—668.
- " " where deceased ordered repairs, when not liable for others ordered by wife or widow, 30—668.

*See Attachment—Survivors—Trusts and Trustees.*

**Extinguishment,** if married woman joins husband in deed, does not extinguish mortgage held by her, 30—13.

F.

- Fees**, when sheriff may look to attorney for fees on execution, 30—117.
- " extra to sheriff, constable, etc., for doing what required and what not required to, 30—365.
- Forgery**, drawer of check not liable if paid on forged indorsement, 30—687.
- " though person to whom paid has rightful possession, 30—687.
- " check wrongfully indorsed, 30—687.
- " when not bound to produce the check, 30—687.
- " check raised from \$10 to \$100, 30—688.
- " bank indorsing it liable, 30—688.
- " one paying his note supposed to be genuine, but forged, 30—688.
- " indorser warrants title, 30—688.
- " when one who merely indorses, to identify, 30—688.
- " must protest, 30—688.
- " money paid on forged note to one who transfers collateral to the note, 30—688.
- " duty of depositor to examine pass-book and vouchers, 30—688.
- " though delay, so statute limitations runs, 30—688.
- " depositor neglected to do so for long time, 30—688.
- " fact check filled out in genuine blank, and negligence in giving access to, 30—688.
- " bank relied on false representations of identity, 30—688.
- " proof of what occurred at payment, 30—688.
- " one identified as payee of telegraph order, 30—688.
- " authority to certify, 30—688.
- " if certified check, at payee's risk, 30—688.
- " teller said raised check good, 30—689.
- " one received payment in bills of broken bank, 30—689.
- " or counterfeit notes, 30—689.
- " if once paid, bank cannot rescind so as to affect others, 30—689.
- " when proof custom no defence, 30—689.
- Fraud**, in obtaining judgment; when relieved from judgment, 30—392.
- " obtained by violating an agreement for compromise, 30—393.
- " vitiates credit on an accounting by administrator, 30—393.
- " debtor making compromise must not be guilty of, 30—611.
- " responsible for fraud of agent, 30—611.
- " represented would have "some means," had more than paid creditors, 30—611.
- " utmost good faith requisite, 30—611.
- " must be perfect equality; one must not be favored without knowledge of others, 30—611.
- " though others may have received part, may credit on debt and recover balance, 30—611.
- " secret obligation to one to secure more than others, illegal, 30—611.
- " creditor accepting secret preference may recover full debt, 30—611.
- " settlement procured by fraudulent statement debtor had left the country, 30—611.
- " effect of infant representing himself of age, 30—619.
- See *Chattel Mortgages—Stockholders*.
- Frauds, Statute of**, when memorandum sufficient, 30—669.
- " " must be complete, and cannot be supplemented by oral proof, 30—669.
- " " when cannot so identify subject-matter, 30—669.
- " " parties and entire terms must appear, 30—669.
- " " must show agreement and identify property, 30—669.
- " " if in several papers, they must show it, and what papers, and oral evidence inadmissible to connect them, 30—669.

**Frauds, Statute of—continued.**

- " " merely names, figures, dates and names of parties, insufficient, **30—669.**
- " " though form immaterial, everything must appear from paper, or by direction to other writings, **30—669.**
- " " offer of bounty, when insufficient, **30—669.**
- " " contract by auctioneer for vendor, but not naming him, **30—669.**
- " " made good by vendor's replies, to requisitions for title, referring to such contract, **30—669.**
- " " auctioneer sold by sample; his memorandum omitted to state sold by sample, held insufficient, **30—669.**
- " " replies to invoice affected by same infirmity, **30—670.**
- " " entries in headed columns by "ditto," after first naming purchaser, not sufficient signature as to lots so entered, **30—670.**
- " " where entry by clerk must call out before entry, **30—670.**
- " " purchaser may revoke auctioneer's authority before he has signed, **30—670.**
- " " illiterate person signing by cross, agreement annexed to conditions, **30—670.**
- " " receipt by auctioneer's clerk, when insufficient, **30—670.**
- " " whether name of auctioneer printed on back sufficient, **30—670.**
- " " names of purchasers written by auctioneer's clerk, **30—670.**
- " " broker's note delivered to both parties, **30—670.**
- " " what sufficient evidence of delivery, **30—670.**
- " " when telegraphic dispatch sufficient compliance with, **30—839.**
- " " proposition in writing, acceptance oral, **30—839.**

**Fraudulent Transfers. See Chattel Mortgages.****G.****Gas Company, one conducting business on own premises, not *per se* a nuisance, 30—567.**

- " " city has power to manufacture illuminating gas, **30—567.**
- " " distribution of through mains not nuisance, **30—567.**
- " " not liable for explosion unless negligent, **30—567.**
- " " gas escaped in consequence of excavation by owner of premises, **30—567.**
- " " remedy of reversioner if negligence of tenant contributed, **30—568.**
- " " gas escaped during conflagration, **30—568.**
- " " injury to health from gas escaping in street, **30—568.**
- " " evidence illness from other causes, **30—568.**
- " " company allowed one to let on gas at request of consumers; he guilty of negligence, **30—568.**
- " " degree of care required from company, **30—568-9.**
- " " how far to prevent careless interference with pipes by others, **30—569.**
- " " lessee may recover if escapes and injures water, **30—569.**
- " " cannot recover for injuries to cattle drinking, after knowledge, **30—569.**
- " " one injured from explosion in sewer from escaping gas, **30—569.**
- " " person injured knew gas escaping, **30—569.**
- " " degree of care required from company, and from person injured, **30—569.**

**Gas Company**—*continued*.

- " " on stopping supply, did not properly close service pipe, **30—569.**
- " " one knew gas escaped, sent servant into cellar with light, **30—569.**
- " " owner called in plumber who caused explosion, **30—570.**
- " " how far gas company liable for defect of gas pipes inside of house, **30—570.**
- " " injury to health from escape, **30—570.**
- " " evidence of notice to company, and attempt to find ; of declarations of person sent, **30—570.**
- " " action against plumber for injury from negligence abates with death of person injured, **30—570.**
- " " action for injury from escape in streets, **30—570.**
- " " proof as to digging in frozen earth, **30—571.**
- " " may show no claim made for long time, **30—571.**
- " " injured person's declarations, **30—571.**
- " " belief of defendant's agent as to injury not admissible on question of care required, **30—571.**
- " " evidence of agent's advice as to what to do, **30—571.**
- " " care required of company in streets, **30—571.**
- " " passer-by fell into trench, **30—571.**
- " " care required of company in restoring street, **30—571.**
- " " if consumer *bona fide* dispute, company not allowed to cut off gas, **30—571.**
- " " rates of former occupant unpaid, **30—571.**
- " " mandamus to compel supply where former bill disputed, and when not, **30—571-2.**
- " " one paid all preceding bills, **30—571-2.**
- " " special contract for future supply, **30—571.**
- " " former bills unpaid, **30—571-2.**
- " " right of company to shut off, **30—572.**
- " " when loss of profits too remote, **30—572.**
- " " if in default supply part of quarter, does not prevent insisting on payment, **30—572.**
- " " when mandamus denied, **30—572.**
- " " duty to supply gas or water to all applying, **30—572.**
- " " meter must be verified or cannot recover for supply, **30—572.**
- " " effect of, if verified, **30—572.**
- " " if not inspected, not evidence, **30—572.**
- " " consolidation of companies, and forfeiture of rights, **30—573.**

**Governor.** See *Reward*.

**Guardian and Ward,** failure of guardian to sue, does not prejudice ward, **30—206.**

**H.**

**Handwriting,** not sufficient to prove received in answer to telegram, **30—839.**

**Hearsay.** See *Evidence*.

**Husband and Wife,** when husband necessary party in suit for wife's tort, **30—104.**

- " " when wife's wrong no defence to suit for injury to husband's rights, **30—104.**
- " " husband not liable for injury by wife's separate property, **30—105.**
- " " nor for wife's conversion of property she claims to be hers, **30—105.**
- " " if wife's interest involved, she may employ own attorney, **30—105.**

**Husband and Wife—continued.**

- " " husband cannot release wife's cause of action, 30—105.
- " " if husband sued for wife's torts, he may control suit, 30—105.
- " " remedy of wife if imprisoned on execution when has no property, 30—105.
- " " liability of husband for supporting wife as poor person, 30—249.
- " " mere separation not sufficient to enable wife to charge husband, 30—250.
- " " wife not liable for necessities unless agrees to become so, 30—250.

*See Covenant—Evidence.*

## I.

**Illegal Agreements**, that master shall not be liable to servant for negligence, 30—337.

- " " infant suing to recover back " margins," 30—618.

*See Fraud.*

**Impeachment.** *See Evidence.*

**Indorsement.** *See Forgery—Warranty.*

**Indorsers.** *See Parol Evidence.*

**Infant**, what are necessities, 30—617.

- " not liable for money borrowed to carry on farm, though expended for necessities, 30—617.
- " indebtedness must be direct for necessities, 30—617.
- " though if expended for necessities, creditor may recover in equity, 30—617.
- " rule for determining whether contract of, void or voidable, 30—617.
- " who may disaffirm his contracts, 30—617.
- " deed or agreement of sale voidable, 30—617.
- " may he disaffirm before majority? 30—617-8.
- " no action against for breach of promise, though inducement to illicit intercourse, 30—617.
- " mere lapse of time short of statute limitations will not preclude disaffirmance, 30—618.
- " nor expenditure by purchaser for improvements, 30—618.
- " infant must give notice of avoidance, 30—618.
- " if statute begins to run during life, will continue to do so against representative, 30—618.
- " upon bill in equity must tender back purchase-money, 30—618.
- " re-entry with notice, disaffirmance sufficient, 30—618.
- " conveyance by, after majority, operates as disaffirmance, 30—618.
- " though void on account of adverse possession, 30—618.
- " effect of entry or recovery of possession by infant before such conveyance, 30—618.
- " effect of infant suing constable who levied on property as that of his vendee, 30—618.
- " when compelled to refund purchase-money, 30—618.
- " how far doctrine unsound, 30—618.
- " effect of infant becoming partner, as between the partners, 30—618.
- " suing to recover back " margins," 30—618.
- " if, on majority, has proceeds of sale, use thereof is ratification, 30—618.
- " if, when repudiates contract, has what has received, must surrender it, 30—618.
- " if repudiates and demands return, may recover in trover, 30—619.

**Infant—continued.**

- " must appear had property on reaching majority, or demand after ineffectual, **30—619.**
- " not liable though stated was of age, **30—619.**
- " when estopped, **30—619.**
- " rights and remedies of, when real estate illegally sold under surrogate's decree, **30—619.**
- " when not father's agent, **30—619.**
- " when father does not ratify son's agreement in his behalf, **30—619.**  
See *Guardian and Ward.*

**Injunction**, when lease restricts to particular use, **30—46.**

- " to restrain slanderous or libellous publication as to goods of rival tradesman, **30—213-4.**  
See *Gas Company.*

**Innkeeper**, guest took property to another room, where exposed and stolen, **30—124.**

**Innocent Persons.** See *Bona fide.*

**Insurance**, company not bound if agent gave credit for premium, **30—816.**  
See *Arbitration.*

**Interpleader**, between parties claiming reward, **30—369.**

**J.**

**Joint Debtors.** See *Merger—Release—Survivors.*

**Judgments**, against deceased persons, how required to be paid in New York, **30—258-9, 827.**  
See *Fraud—Merger—Survivors.*

**L.**

**Landlord and Tenant**, when tenant enjoined from using for particular purpose, **30—46.**

- " " when lease does not restrict to particular use, **30—46.**
- " " effect of landlord covenanting not to let adjoining land for particular purpose, and breach, **30—46.**
- " " which bound to pay certain taxes, **30—236.**
- " " remedy of landlord for injury, to which tenant contributed, **30—568.**
- " " when tenant may recover, **30—569.**

**Law**, presumption that common law obtains in other States, **30—284.**

**Lease**, restricting to particular use, **30—46.**  
See *Landlord and Tenant.*

**Legitimacy.** See *Evidence.*

**Letters.** See *Agreements.*

**Levy.** See *Attachment.*

**Lex loci**, property mortgaged in one State taken to another, **30—818.**

**Libel**, of goods of rival tradesman, **30—213-4.**

- " of partnership, **30—213-4.**

**Lien.** See *Chattel Mortgages—Sales.*

**Limitations, Statute of**, debt not destroyed, remedy merely lost, **30—206.**

- " " if new promise, suit to be on original debt, **30—206.**
- " " in New York, complete bar unless acknowledgment and willingness to pay, **30—206.**
- " " failure of guardian to sue does not prejudice ward, **30—206.**

**Limitations, Statute of—continued.**

- " " promise must indicate intent to pay, **30—207.**
- " " when payment of part does not bind to pay balance, **30—207.**
- " " unaccepted offer not sufficient, **30—207.**
- " " acknowledgment must be to creditor or agent, **30—207.**
- " " if did not know was agent, not sufficient, **30—207.**
- " " requisites of acknowledgment, **30—207.**
- " " when part payment sufficient, **30—207.**
- " " requisites of new promise in bankruptcy, **30—207.**
- " " when writing insufficient, **30—207-8.**
- " " when sufficient, **30—208.**
- " " providing for debt in assignment, **30—208.**
- " " executor included own debt (barred) in inventory, **30—208.**
- " " executor directed attorney to pay out of fund, **30—208.**
- " " executor including debt in petition to sell realty, **30—208.**
- " " one of several executors promising to pay debt, **30—208.**
- " " executor requesting not to sue, **30—208.**
- " " creditor realized on policy of insurance held as collateral, **30—209.**
- " " debtor told of such payment made no reply, **30—209.**
- " " burthen on creditor to show partial payment was within time, **30—209.**
- " " promise *conditional*, **30—209.**
- " " in action against clerk for negligence in search, **30—382.**
- " " against depositor when forged check paid, **30—588.**

**M.**

**Mandamus**, on State auditor for reward, **30—368.**

" to compel supplying of gas, **30—571-2.**

**Married Woman**, if joins husband in deed, does not extinguish mortgage held by her, **30—18.**

" " not estopped as to opinion of effect of writing, **30—18.**  
See *Husband and Wife*.

**Master and Servant**, articles on rights and liabilities of, cited, **30—337.**

" " agreement by employe, master not to be liable, **30—337.**

" " when surety completing job is employer, **30—337.**

" " when lessor not liable for defective plank used in dry dock, **30—337.**

" " privity where servants of one person obliged to work on premises of another, **30—337.**

" " liability of county to convict injured in penitentiary, **30—337.**

" " engine driver of one company injured by collision trains of another using same tracks, **30—337.**

" " such injury ordinary perils of employment, **30—337.**

" " how far bound in such case to strictly observe rules, **30—337.**

" " grounds of master's liability to servant, **30—338.**

" " employer knowing risk, employe does not, **30—338.**

" " duty of railway to make reasonable rules, **30—338.**



**Master and Servant—continued.**

- " " employe knowing of habitual and continued negligence, continued in service, **30—338.**
- " " employe injured from disregard of instructions, **30—338.**
- " " running too fast over switch, **30—338.**
- " " employe assumes usual risks and perils, **30—338.**
- " " how far employe presumed to know laws of nature, **30—339.**
- " " knew *facts* but not *danger*, **30—339.**
- " " what is knowledge of danger, **30—339.**
- " " injured in ordinary course of employment after fair opportunity to become acquainted with risks, **30—339.**
- " " exception in case of sailor bound to obey orders, **30—339.**
- " " when employe may defer to opinion of others as to danger, **30—339.**
- " " one injured by uncovered shaft, **30—339.**
- " " only where master withdraws from management, as in case of corporations, *must* act through agents liable for negligence of one acting in stead, **30—340.**
- " " master abdicating and giving employe full discretion, though superintendent competent, **30—340.**
- " " master delegating to another power to employ workmen, **30—340.**
- " " when master not liable for negligence of foreman, **30—340.**
- " " master's liability does not depend on grade or rank of employe, but on *character* of the act, **30—340.**
- " " master responsible if act be one pertaining to duty of employer, **30—340.**
- " " not if be act pertaining to duty of operative, **30—340.**
- " " superior signalled engine driver to start, **30—340.**
- " " that negligent servant superior of one injured in same common employment does not render master liable, **30—340.**
- " " peculiar rule in *Ohio*, **30—341.**
- " " fact co-employes hired and discharged by different agents does not affect rule, **30—341.**
- " " peculiar rules as to who co-employe, in *Illinois*, **30—341.**
- " " master not liable for negligence of co-employe, **30—341.**
- " " changed by statute in *Iowa* and *Wisconsin*, **30—341.**
- " " rule qualified by exception must have been in management of proper machinery, **30—341.**
- " " workman injured by fall of derrick insecurely fastened, **30—341.**
- " " who are fellow servants, **30—342.**
- " " who not, **30—342.**
- " " master must furnish competent and skilful co-servants, **30—342.**
- " " to discharge those incompetent and unskilful, **30—343.**
- " " master must know of incompetency, or should have known by ordinary diligence, **30—343.**
- " " presumption was unknown and machinery proper, **30—343.**
- " " proper qualifications presumed to continue, **30—343.**
- " " unfitness when employed, **30—343.**
- " " extent of inquiry required from employer as to alleged carelessness, **30—343.**

**Master and Servant—continued.**

- " " notice to car inspector and mechanic only to fellow servants, and not sufficient, **30—343.**
- " " so to master mechanic of negligence of car inspector, unless had power to employ and discharge him, **30—343.**
- " " evidence engineer had threatened to run over brakeman, **30—343.**
- " " one employe injuring another from malice, **30—343.**
- " " cases as to master's liability for defective machinery, **30—343.**
- " " duty of master to furnish proper and adequate help, machinery, appliances, track, etc., **30—343.**
- " " rule does not apply to servant taking defective machinery for repairs, **30—344.**
- " " nor to servant repairing defective machinery, **30—344.**
- " " use of defective track only occasional and for special purposes, **30—344.**
- " " duty to exercise continual supervision over machinery, required by circumstances, **30—344.**
- " " though machinery defective, due care by employe necessary, **30—345.**
- " " engine driver cleaning ash-pan at improper place, **30—345.**
- " " if employe young, his discretion to be taken into account, **30—345.**
- " " so if deaf and dumb, **30—345.**
- " " when want of permission to be at place injured, no defence, **30—345.**
- " " section boss did not have defect repaired, or notify proper person, and workman injured, **30—345.**
- " " section boss and laborer co-employe, **30—345.**
- " " foreman in charge did not have machinery repaired and laborer injured, neglect of co-employe, **30—345.**
- " " one company not inspecting car of another passing over its road, **30—345.**
- " " not sufficient master might have known machinery defective; not sufficient, irrespective of probable harm or danger, **30—345.**
- " " danger hidden so not apparent to inexperienced person who is injured, **30—346.**
- " " employer introducing new and unusual machinery involving unexpected and unanticipated danger, **30—346.**
- " " master not guarantor of machinery, **30—346.**
- " " master must have notice of defects, must be discoverable by inspection, or want of reasonable care which would have discovered them, **30—346.**
- " " not bound to very best or of most approved description, only such as are in general use, **30—346.**
- " " so in transporting cars of other roads which have not most approved appliances, **30—346.**
- " " no presumption company or superintendent has superior means of information over mechanic in shops, **30—346.**
- " " if tools not best, but may by ordinary care be safely used, master not liable, **30—347.**
- " " if machinery defective to servant's knowledge, though not aware of degree of defectiveness, bound to use eyes and faculties to ascertain, **30—347.**
- " " if does not, master not liable, **30—347.**

**Master and Servant—continued.**

- " " rule does not apply to sailor on vessel, **30—347.**
- " " if could reasonably have discovered defect and report to master, and did not, master not liable, **30—347.**
- " " if servant knows character and position of structures by which employes might be injured, master not liable, **30—347.**
- " " if servant notify master of defects or danger, and master promise to remedy, servant's continuance in service not, as matter of law, contributory negligence, **30—347-8.**
- " " foreman having charge of machinery ordered infant or inexperienced employe upon dangerous duty, not within ordinary or proper duty of such servant, **30—348.**
- " " explosion of machinery not presumptive evidence of negligence, **30—348.**
- " " building burned from want of water in tank, presumptively from negligence of co-employe in not keeping in order, **30—348.**
- " " cases where master held not liable to servant, **30—348-9.**
- " " for cases where held liable, **30—349.**
- " " one servant liable to co-servant for his own negligence, **30—349.**

**Merger, recovery against one wrongdoer without satisfaction, 30—256.**

- " recovery on note not bar to foreclosure of collateral mortgage, **30—256.**
- " recovery against one joint debtor merges remedy against other, **30—256.**
- " separate recoveries against partners, **30—256.**
- " judgment against one of two joint sureties can only be enforced for half, **30—256.**
- " other surety released thereby, **30—257.**
- " one of two paid half and was released; other liable for his half, **30—257.**
- " set-off merged in judgment, pending suit in which plead, **30—257.**
- " does bankruptcy discharge affect subsequent judgment, **30—257.**
- " relief, how obtained, **30—257.**

*See Survivors.*

**"More or less," meaning of, 30—535.**

**Mortgage, if one having no title makes and subsequently acquires one, subsequent purchaser not chargeable with constructive notice of mortgage, 30—18.**

- " if wife joins husband in deed, does not extinguish mortgage held by her, **30—18.**
- " assignee takes subject to equity, **30—37.**
- " assignee took on faith of mortgagor, latter estopped, **30—38.**
- " surviving mortgagee may give, **30—503.**

*See Chattel Mortgages.*

**Municipal Bonds, after officer borrowed all authorized, borrowed more under apparent authority, 30—37.**

*See Day.*

**Municipal Corporations, how far change of grade will render liable, 30—89.**

- " " how far owner of stream liable, if city has converted into sewer, **30—89.**
- " " liability for using stream as sewer, **30—90.**
- " " officers cannot employ one of own body, **30—632.**
- " " liability, when agent of issued more paper than authorized, **30—825.**

*See Rewards—Water and Watercourses.*

## N.

**Necessaries.** See *Husband and Wife—Infant.*

**Negligence,** telegraph company may not contract against its own, **30—9.**

- " in selling, without repeating message, **30—9.**
- " duty of register or clerk to make correct search, and liable for negligence in making, **30—381.**
- " though person ordering designates particular clerk to make, **30—381.**
- " pleading in suit for such negligence, **30—381.**
- " did not index deed in general index, and consequently did not put it in search, **30—381.**
- " one knowing of defect cannot recover, **30—381.**
- " clerk did not docket judgment, so lost, **30—381.**
- " borrower obtained search; searcher not liable to lender for no privity, **30—381.**
- " lender went to clerk, who reiterated accuracy of search, **30—381.**
- " lender may employ borrower as agent to obtain search, **30—381.**
- " only liable for direct damages, **30—381.**
- " not from loss of property from failure to pay judgment, **30—381.**
- " deed reciting mortgage for part purchase money on record; mortgage not; subsequent mortgagee chargeable with notice of mortgage, and clerk not liable for not recording, **30—381-2.**
- " sureties of clerk, how far liable for his negligence, **30—382.**
- " statute of limitations runs from delivery and not from development of damages, **30—382.**
- " or from discovery of error, **30—382.**
- " equitable suit will not lie for negligence in investigating title, **30—382.**
- " liability of attorney, negligence in investment, **30—382.**
- " not having mortgage recorded, **30—382.**
- " in managing suit, **30—382.**
- " one fell into trench in street dug by gas company, **30—571.**
- " care required of company in restoring street, **30—571.**

See *Carriers—Forgery—Gas Company—Master and Servant—Telegraph Company.*

**Notice,** deed reciting mortgage for part purchase money on record; mortgage not; subsequent mortgagee chargeable with notice of mortgage, and clerk not liable for not recording, **30—381.**

- " fact one of borrowers, director of bank, does not render fact known to him, notice to bank, **30—502.**

See *Bona fide—Partnership.*

**Nuisance.** See *Negligence—Water and Watercourses.*

## O.

**Officers,** cannot employ one of own body, **30—632.**

See *Reward—Trust and Trustees.*

**Onus,** where mistake in telegram shown, company must show not from own negligence, **30—9.**

See *Partnership.*

P.

- Parol evidence**, not admissible to show indorser not to be liable, **30—669.**  
 “ “ nor between indorsers, to show that indorsements should be joint and not successive liability, **30—669.**  
 “ “ when not bound to produce paper in another's custody, **30—687.**

**Particulars, Bill of.** See *Bill of Particulars.*

**Parties, non-joinder of party guilty of negligence, no defence,** **30—677.**  
 See *Husband and Wife.*

- Partnership**, slander of, when one partner may recover, **30—213-4.**  
 “ if firm name that of one partner, when firm bound by note given by him in such name, **30—501.**  
 “ when one of firm of attorneys cannot bind copartner for money borrowed, **30—501.**  
 “ one borrowing his share capital to lender's knowledge, **30—501.**  
 “ one borrowing, on individual responsibility, money which goes into firm business, **30—502.**  
 “ one having notice, not firm business, **30—502.**  
 “ transaction frequently notice, **30—502.**  
 “ fact is guarantor of another's paper, is, **30—502.**  
 “ onus on lender to show done in business, **30—502.**  
 “ one member has no power to sign guaranty, **30—502.**  
 “ note payable to firm and indorsed thereby, **30—502.**  
 “ fact one of payees director of bank loaning, no notice to it, **30—502.**  
 “ rights creditor of firm where one partner has paid individual debt out of firm assets, **30—502.**  
 “ when new firm not liable for debts of old, **30—502.**  
 “ when property acquired by one, held to be firm assets if paid for thereout, **30—502.**  
 “ when business ceases, is end to partnership, **30—502.**  
 “ and right to give new note ceases, **30—502.**  
 “ though for old debt, **30—502.**  
 “ if has notice partnership ended, has that power to guaranty as member firm ceased, **30—502.**  
 “ death of one partner ends partnership, **30—503.**  
 “ survivors have no right to continue the business, **30—503.**  
 “ nor to carry out provisions of partnership, **30—503.**  
 “ if may carry out contracts with strangers, cannot as between partners, **30—503.**  
 “ survivors may make small purchases to carry on business, **30—503.**  
 “ liability of survivors making purchases, **30—503.**  
 “ surviving mortgagee may give valid discharge, **30—503.**  
 “ power of surviving partner, **30—726.**  
 “ firm had ordered goods but not delivered till after dissolution, **30—726.**  
 “ cannot recover on note by one, but can for goods sold, **30—726.**  
 “ one gave note for goods ordered, liability of other, **30—726.**  
 “ when retiring partner not liable for goods ordered, **30—726.**  
 “ order varied, **30—726.**  
 “ power of one to indorse after dissolution, **30—726.**

See *Merger—Survivors.*

**Passengers.** See *Railways.*

**Pauper.** See *Husband and Wife.*

**Payment**, in counterfeit or broken bank bills, **30—689.**

“ if once paid, bank cannot rescind so as to imperil rights of others, **30—689.**

See *Forgery.*

**Performance.** See *Reward.*

**Pleadings**, variance between proof and pleadings as to offer of reward, **30—366.**

“ in suit for negligence in making search, **30—381.**

“ dispute as to sale; vendee agreed to pay if receipt proved to satisfaction of G., **30—816.**

**Practice.** See *Bill of Particulars.*

**President.** See *Reward.*

**Presumption**, that common law prevails in other States, **30—284-5.**

“ as to knowledge of laws of nature by employe, **30—338.**

“ workmen and machinery proper, **30—343.**

“ that proper qualifications continue, **30—343.**

“ unfitness at time of employment, **30—343.**

“ none that company or superintendent has any superior means of information over mechanic in shops, **30—346.**

“ explosion of machinery not presumptive evidence of negligence, **30—348.**

“ that want of water in tank from negligence of co-employe, **30—348.**

See *Evidence—Onus—Partnership.*

**Principal and Agent**, after agent had borrowed all he was authorized to, borrowed more under apparent authority, **30—37, 825.**

“ which of two parties agent acts for, **30—37.**

“ buyer having seller obtain search, **30—381.**

“ when son not father's agent, **30—619.**

“ when father does not ratify son's agreement in his behalf, **30—619.**

“ liability of one executing lease as treasurer of voluntary association without authority of associates, **30—665.**

“ liability of committee for debt incurred on behalf of society, **30—665.**

“ liability of members, **30—665.**

“ how agent should execute sealed instrument to bind principal, and not self, **30—666.**

“ when binds self, not principal, **30—666.**

“ obligatory clause bound defendants, trustees, etc., personally liable, **30—666.**

“ note by directors, value received on account of company, not describing themselves as directors, personally liable, **30—666.**

“ affixing “agent” to name *prima facie* personally liable, **30—666.**

“ what must show to relieve himself, **30—666.**

“ bill addressed to president of corporation; accepted “for — corporation, H. Read, sec'y,” held personally liable, **30—666.**

“ lease to A., president and others, directors of society, when presumptively personally liable, and how may exonerate themselves, **30—666.**

“ bill to A., executor; accepted, “A., ex'r,” not personally liable, **30—666.**

“ “we promise to pay, as trustees of Corinth Lodge,” not personally liable, **30—666.**

“ school committee are public officers, and not personally liable, **30—667.**

**Principal and Agent**—*continued.*

- " " draft by "A." sec'y, may be shown, as against one not *bona fide* holder, to be one of association, and not of A. individually, **30—667.**
- " " we, the trustees, etc., not personally liable, **30—667.**
- " " owner may recover of broker who sold on employment of his factor, subject to equities, **30—667.**
- " " one dealing *bona fide* with agent, entitled to set-off, **30—667.**

See *Bona fide—Fraud—Frauds, Statute of—Master and Servant—Partnership—Reward—Stockholders—Trust and Trustees.*

**Principal and Surety**, when surety completing job is employer, **30—337.**

- " " liability of surety of clerk for negligence, **30—382.**
- " " work to be done to surety's satisfaction; what sufficient, **30—818.**

See *Merger—Survivors.*

**Privity**, between purchaser and clerk making search, **30—381.**

See *Master and Servant.*

**Profits**, for loss, in not supplying gas, too remote, **30—572.**

**Prospectus.** See *Stockholders.*

**R.**

**Railways**, company issuing ticket bound that connecting will transport transferee, **30—284.**

- " regulation if stops, shall procure stop-over ticket, **30—284.**
- " conductor applied to for stop-over ticket, gave trip ticket, and next conductor put passenger off, **30—284.**
- " right to put off one not having proper ticket, and refusing to pay fare, **30—284.**
- " Maine statute that may stop-over, only applies in that State, **30—284.**
- " other States presumed to have common law, **30—284.**
- " ticket from one point to another for a continuous ride; passenger paid to first point and tendered ticket for balance of distance, **30—435.**
- " liability on ticket for route over lines of connecting, **30—550.**
- " mortgage upon property to be acquired, **30—807.**

See *Carriers—Master and Servant.*

**Railway Companies.** See *Carriers.*

**Receiver**, when allowed for outlay not previously sanctioned, **30—668.**

See *Attachment.*

**Record.** See *Bona fide.*

**Register**, negligence in searching, **30—381.**

**Release**, one joint debtor paid half and was released; other liable for half, **30—257.**

See *Husband and Wife.*

**Remote Damages**, on negligence in making search, **30—381.**  
for not supplying gas, **30, 572.**

**Rent**, due from decedent's, how to be paid by personal representatives, **30—827.**  
See *Landlord and Tenant.*

**Replevin**, on conditional sale, **30—815.**

**Res adjudicata**, when fraud prevents judgment or adjudication being, **30—893.**

**Rescission.** See *Chattel Mortgages—Fraud—Infant—Payment.*

**Res gesta,** what occurred on paying check, 30—688.

**Residence,** what required to be entitled to vote, 30—707.

“ resident of one district cannot vote in another, 30—707.

“ changing boundary of city, 30—707.

“ inmate of asylum, 30—707.

“ inmate of county infirmary, 30—708.

“ went to Texas intending to remain if satisfied, 30—708.

“ residing elsewhere as public officer, 30—708.

“ college students, 30—708.

“ inmate of county poor house, 30—708.

**Reversioner,** remedy for injury from gas if negligence of life tenant contributed, 30—568.

**Revivor.** See *Abatement—Survivors.*

**Reward,** public officer, whose duty to arrest, not entitled to, 30—365.

“ sheriff not entitled to additional compensation for services to prisoners, 30—365.

“ constable charging extra for going out of county, 30—365.

“ when Governor signs proclamation offering reward it takes effect, though not published, 30—365.

“ may be withdrawn before rights acquired under it, 30—365.

“ though cannot be after services rendered, 30—365.

“ whether entitled to, though not aware of it, when made arrest or performed services, 30—365.

“ on compliance with terms of, entitled to it, 30—365.

“ bound to pay, though person returning property refuses to give name of principal, 30—365-6.

“ so, though makes threats if not paid, 30—365-6.

“ “liberal reward” for information and specific sum for arrest, when entitled to “liberal reward,” though not specific sum, 30—366.

“ agreement to pay or carry stocks for reliable information; rights of parties, 30—366.

“ variance between proof and pleading, 30—366.

“ by town for information, arrest, etc., of those guilty of arson, 30—366.

“ arrest and additional evidence long after original disclosure, 30—366.

“ one employing another to make arrest, entitled to, 30—367.

“ one brought thief back on requisition, though arrested by others in another State, 30—367.

“ one found out principal, but not accomplice, 30—367.

“ merely communicating suspicions and also beliefs of others, 30—367.

“ so mere statement A. is guilty, based on mere suspicion, 30—367.

“ for escaped prisoner, though after arrest taken elsewhere for other crime, 30—367.

“ on conviction entitled to on verdict, if no further proceedings, 30—367.

“ so, though dismissed on motion people's attorney, 30—367.

“ so, though used as witness, 30—367-8.

“ so if attorney for prosecutor dismisses, 30—367-8.

“ accused committed suicide before conviction, 30—368.

“ arrest of fugitive though reward unrevoked, 30—368.

“ mandamus on State auditor for, 30—368.

“ Governor authorized to offer \$200, offered \$600; legislature allowed \$600, held not entitled to the \$200 in addition, 30—368.

“ stakeholder received to be paid to person producing records; paid to one; cannot be recovered back on ground some damaged, 30—368.

“ excessive and unreasonable reward not binding on government, 30—368.



**Reward—continued.**

- " State statute as to, does not apply to offences against *United States*, 30—368.
- " interpleader between persons claiming, 30—369.

**S.**

**Sales**, conditional sales valid at common law, 30—815.

- " not affected by statute of frauds, 30—815.
- " creditors of and purchasers from vendee, no rights, 30—815.
- " vendor must demand before suit; of wife insufficient, 30—815.
- " until demand replevin will not lie, 30—815.
- " on failure by vendee and reclamation by vendor, note for purchase price without consideration, 30—815.
- " sale of watch if vendee liked it at expiration of thirty days; vendee's creditors no rights, 30—815.
- " goods delivered without insisting on payment, 30—816.
- " rights of *bona fide* purchaser, 30—816.
- " agent gave credit for premium on policy of insurance, 30—816.
- " dispute, and agreed to pay if proved receipt thereof to satisfaction of G., 30—816.
- reaper left to be kept, if on trial satisfactory; vendee not bound to try at all, 30—816.
- " when not bound to try, if other similar machines did not work, 30—816, 817.
- " when not bound to keep until tried both as a reaper and a mower 30—817.
- " what not reasonable time to return, 30—817.
- " when offer to return not sufficient rescission, 30—817.
- " when is, 30—817.
- " vendee to be allowed to cut five acres; cut more on *two* trials after seller notified of failure, 30—817.
- " when purchased, bound to try or allow trial, 30—817.

See *Agreements—Chattel Mortgages—Work and Labor*.

**Satisfaction**, one joint debtor paid half and was released; other liable for half, 30—257.

- " survivor may give, 30—503.

See *Husband and Wife—Work and Labor*.

**Search.** See *Negligence*.

**Sentence.** See *Criminal Law*.

**Set-off**, cannot be filed in two suits, 30—257.

- " merged in judgment pending suit in which plead, 30—257.
- " against agent, when allowable, 30—667.

**Sewers.** See *Water and Watercourses*.

**Sheriff**, when may look to attorney for fees on execution, 30—117.

See *Attachment—Reward*.

**Slander**, of goods of rival tradesman, 30—213-4.

- " of partnership, 30—213-4.

**Sleeping Car.** See *Carriers*.

**Society.** See *Principal and Agent*.

**State**, liability to convict, 30—337.

**Steamboat.** See *Carriers*.

**Stocks**, offer of reward for reliable information, and agreement to carry; rights of parties, 30—366.

See *Bona fide*.

**Stockholders**, remedy of, if induced to subscribe by fraud, 30—186.

- " prospectus suppressed facts, 30—186.

**Stockholders—continued.**

- " assignee of mortgage to secure subscription fraudulently induced, 30—186.
- " as against creditor or receiver, fraud no defence, 30—186.
- " resolution on eve of insolvency that all paying five per cent. to be released, 30—186.
- " agreement subscription may be withdrawn, 30—186.
- " settlement of alleged fraud not binding on receiver, 30—186.
- " rights of one where company agreed to redeem stock, 30—186.
- " agents practising fraud, personally liable, 30—186.
- " subscription delivered as escrow, but voted on stock, 30—186.
- " on condition that in judgment of directors sufficient subscribed, 30—186.

**Suffer. See Bona fide.****Survivors, when representatives of deceased may be joined with survivors, 30—257.**

- " so as to any parties jointly liable, 30—257.
- " defendant served died before others served, should not revive but proceed against other defendants, 30—257.
- " if severally liable, may allow severance, 30—257.
- " representative of party to promissory note, under *New York* statute, 30—257.
- " but separate judgments to be entered, 30—257.
- " rule, representatives and survivor cannot be joined, does not apply to action against trustees for breach of trust, 30—257.
- " action on joint and several bond against survivors and representatives, 30—257-8.
- " if jointly and severally liable, need not show survivors insolvent, 30—258.
- " when representative of one assignor and survivor, may be joined with assignee in suit by creditor in suit to compel assignee to account, and for judgment for deficiency, 30—258.
- " what complaint must show when survivor and representative of deceased joined, 30—258.
- " how objection cannot be joined to be taken, 30—258.
- " one of two sureties dies, survivor liable for all, 30—258.
- " personal representative of survivor of two executors on reversal of paid judgment, 30—258.
- " death of surety jointly liable only, 30—258.
- " joint judgment on several liability, 30—258.
- " joint surety not served, cannot be summoned under *New York* code 30—258.
- " if apparently principal debtor, liability not extinguished by death, unless creditor knew, or have notice of suretyship, 30—258.
- " statutory remedy, as judgment lien, not extinguished by death of joint surety, 30—258.
- " how representatives required to pay judgments in *New York*, 30—258, 827.
- " to what, judgments applies, 30—259.
- " though obligation joint, liable if deceased received part of consideration, 30—259.
- " if representatives expressly bound, liability not extinguished by death, 30—259.
- " if survivor compelled to pay entire debt, may have contribution against representative of co-surety, 30—259.
- " actions for personal injuries do not survive party inflicting injuries, 30—399.
- " surviving mortgagee may give valid discharge, 30—503.

See *Partnership*.

T.

- Taxes**, landlord and tenant, which bound to pay certain taxes, 30—236.  
 “ against decedent, how to be paid by representative, 30—827.
- Telegram**, that received in answer to, not sufficient to prove handwriting, 30—839.  
     *See Agreements.*
- Telegraph Company**, stipulation not to be liable for mistakes, 30—9.  
 “ “ if mistake, onus on company to show not from own negligence, 30—9.  
 “ “ when message not in cypher, 30—9.  
 “ “ damages from erroneous message, 30—9.  
 “ “ from not repeating message, 30—9.  
 “ “ in Lower Canada liable to receiver of message, 30—9.
- Tickets.** *See Railways.*
- Time.** *See Criminal Law—Day.*
- Title**, chattel mortgaged property sent out of State and sold, proceeds paid on debt, 30—818.  
     *See Chattel Mortgages—Sales.*
- Title, After-acquired.** *See Covenant.*
- Torts.** *See Husband and Wife.*
- Tradesman**, defamation of, 30—218-4.
- Trover**, one selling goods for another in good faith, 30—818.
- Trust and Trustees**, action against survivor and representatives of deceased for breach of trust, 30—257.  
 “ “ trust fund may be followed so long as can be traced, 30—631.  
 “ “ unless rights of innocent third parties have intervened, 30—631.  
 “ “ right to follow fails when means of ascertainment does, 30—631.  
 “ “ as where mixed with trustee's other funds, 30—631.  
 “ “ mere failure to account for fund will not authorize to reach land without proof fund invested therein, 30—632.  
 “ “ using to improve lands will not authorize to follow as against trustee's creditors, 30—632.  
 “ “ officer mingled official money with own and paid own debts thereout; creditor not liable to one injured by commingling, 30—632.  
 “ “ agent cannot deal with principal in matters within limits of agency, 30—632.  
 “ “ trustee cannot purchase trust property, 30—632.  
 “ “ board of health cannot employ own member, 30—632.  
 “ “ director cannot make contract for own benefit with corporation, 30—632.  
 “ “ cannot deal in own behalf in respect to trust matters, 30—632.  
 “ “ right of corporation does not depend on fraud or good faith, 30—632.  
 “ “ but must restore what corporation has received, 30—632.  
 “ “ rule where taken on debt, 30—632.  
 “ “ cannot purchase bonds below par, 30—632.  
 “ “ rights of *bona fide* purchaser from, 30—632.  
 “ “ rights of purchaser from, on precedent debt, 30—632.  
 “ “ director's firm sold property to corporation, 30—632.  
 “ “ right to avoid dealings with other directors, 30—633.

**Trust and Trustees—continued.**

- " " though new company cannot avoid, 30—633.
- " " cannot recover commission for guaranty, 30—633.
- " " if agreement voidable, cannot themselves, for corporation, ratify it, 30—633.
- " " if has, in good faith, sold to third person, may purchase property sold, 30—633.
- " " if sale fair when made, subsequent acts will not overthrow, 30—633.
- " " rule applies to legacy to attorney, 30—633.
- " " though good if understandingly made, 30—633.
- " " one alleging purchase in good faith must establish it, 30—633.
- " " what must allege and prove, 30—633.
- " " one dealing with must look to them and not to trust estate, 30—633.
- " " cannot give lien on trust estate if that not indebted to them, 30—633.
- " " when not allowed for improvements, and how various equities relative thereto adjusted, 30—634.
- " " trust property improved and let to one of them; liability for rent, etc., 30—634.
- " " contract for benefit of trust estate renders trustee personally liable, 30—667.
- " " though after failure to collect, creditor may reach trustee's interest in trust estate, 30—667.
- " " trustee may make necessary repairs and reimburse himself, 30—667.
- " " when cannot make permanent improvements on vacant lot, 30—667.
- " " when creditor may look to trust estate, 30—667-8.
- " " when may borrow money to make improvements and be allowed therefor, 30—668.
- " " when receiver allowed for expense not previously sanctioned by court, 30—668.
- " " deceased ordered repairs, when representatives not liable for further repairs ordered by wife or widow, 30—668.
- " " no expenses by *cestui que trust* of fund for life, can be paid out of income after death, 30—668.
- " " though remaindermen his children, 30—668.
- " " as to expenses of filing account, etc., 30—668.
- " " trust fund must bear expenses of administration, 30—668.
- " " though bill filed by one *cestui que trust*, if for benefit of all, 30—668.
- " " though such a plaintiff not entitled to personal expenses, 30—668.
- " " large allowances disapproved, 30—669.

**U.**

**Ultra Vires.** See *Reward*.

**V.**

**Variance**, between proof and pleadings as to reward, 30—366.

**Vendor and Purchaser**, defective search, 30—381.

**Vendor and Vendee.** See *Chattel Mortgages—Covenant*.

**Voter.** See *Residence*.

W.

**Warranty**, indorser warrants genuine and title, **30—688.**

" when act of indorser to identify, **30—688.**

See *Covenant—Principal and Agent.*

**Water**, refusal to supply, where rate of former occupant unpaid, **30—571.**

" duty to supply to all applying, **30—572.**

**Water and Watercourses**, one may fill up wet and marshy places, **30—87.**

" " though incommodes neighbor's lands or prevents water reaching natural watercourse, **30—87.**

" " if surface water flows on to lower lands, may not concentrate in ditches, **30—87.**

" " limit of right to make drains, **30—87.**

" " how and to what extent may erect barriers to water flowing on to own lands, **30—88.**

" " how far may control such as *arise* on own land, **30—88.**

" " city, concentrating in gutters or drains, **30—88.**

" " how far may do so, **30—88.**

" " one using natural stream for sewer, how far can prevent others doing so, **30—88.**

" " right to drain into natural stream, **30—88.**

" " statutory right to drain *across* another's land, **30—88.**

" " duty of railroad company agreeing to construct drains, culverts, etc., **30—88-9.**

" " culvert under embankment broke, **30—89.**

" " embankment collected water, **30—89.**

" " change of grade damaging property, **30—89.**

" " how far owner of stream liable, if city has converted into sewer, **30—89.**

" " liability of different parties polluting stream, **30—90.**

" " how much may take for irrigation, **30—90.**

" " liability of city for using stream as sewer, **30—90.**

" " water injured by escape of gas, **30—569.**

**Witness.** See *Evidence.*

**Words**, "about," **30—535.**

" "more or less," **30—535.**

**Work and Labor**, when only bound to employ as long as satisfied, **30—818.**

" " so employe may leave, **30—818.**

" " when *good faith* of leaving, material, **30—818.**

" " when work to be done to employer's satisfaction, cannot recover, unless as reasonable person he ought to be, **30—818.**

" " work to be done to surety's satisfaction; what sufficient, **30—818.**

" " what employer bound to pay where agrees to pay what thinks is worth, **30—818.**

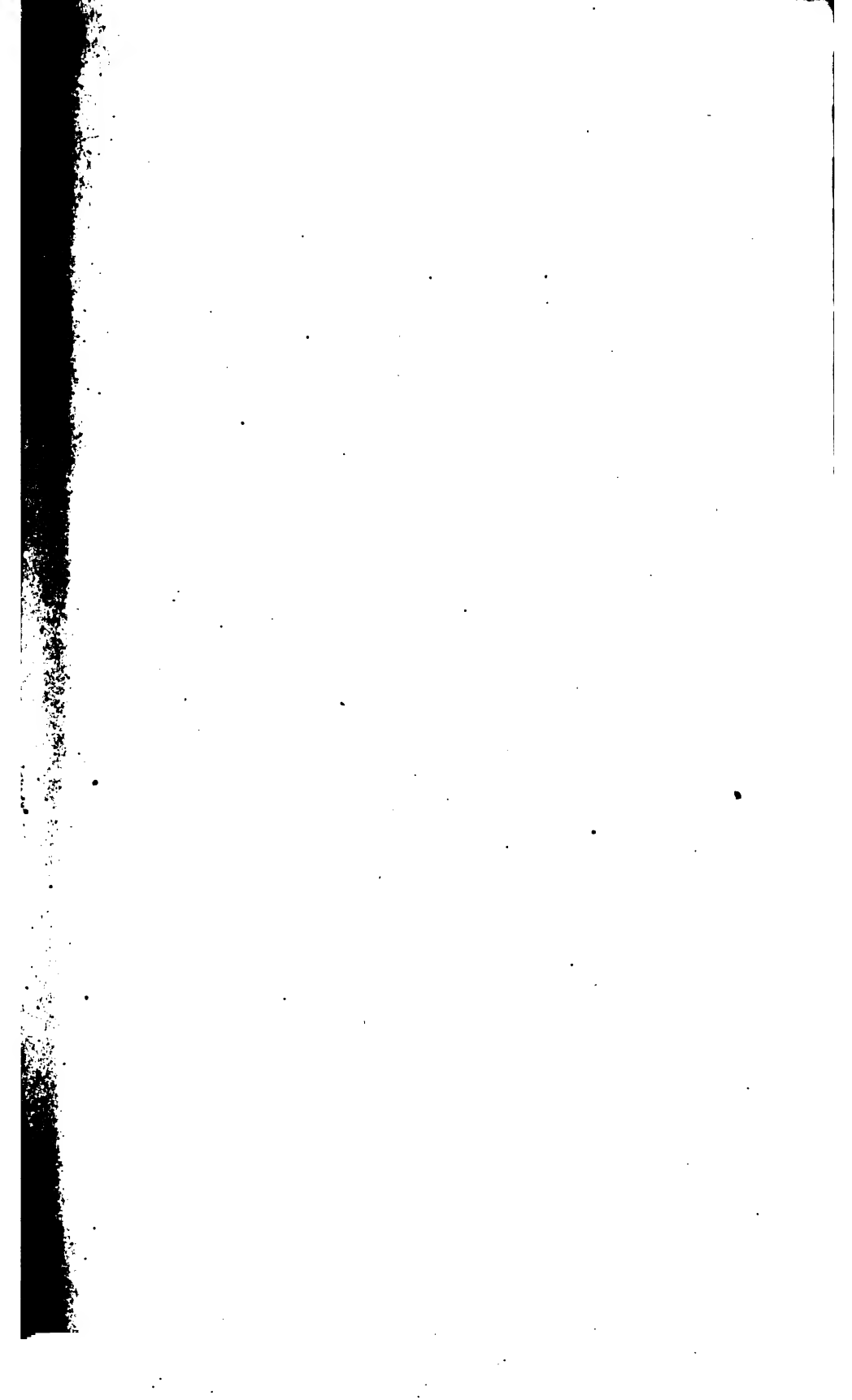
**Writing**, when verbal request to arbitrate insufficient, **30—464.**

" when agreement binding, though not reduced to writing, **30—839.**

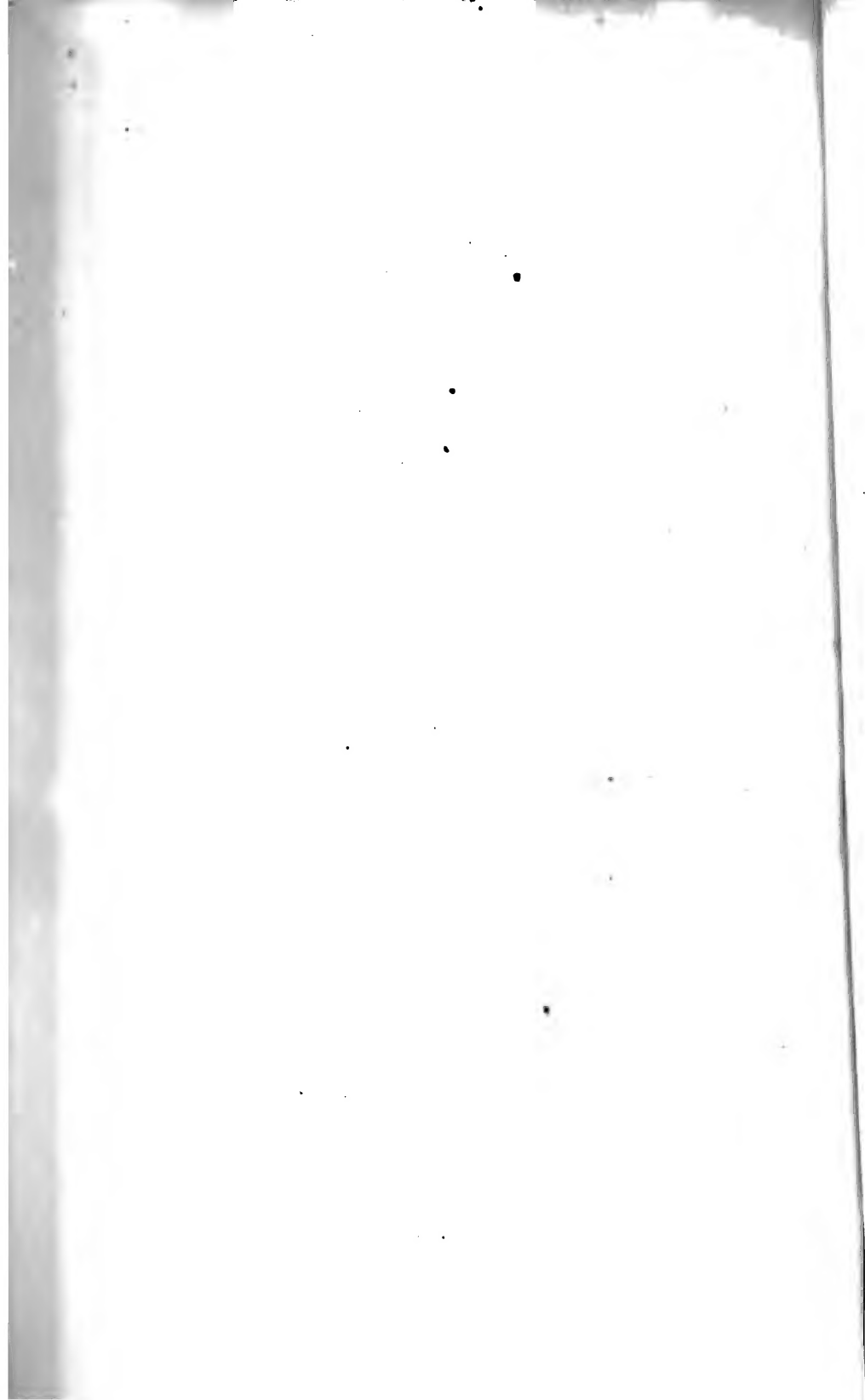
**Wrongdoers**, recovery against one without satisfaction, **30—256.**

" non-joinder of one, no defence, **30—877.**

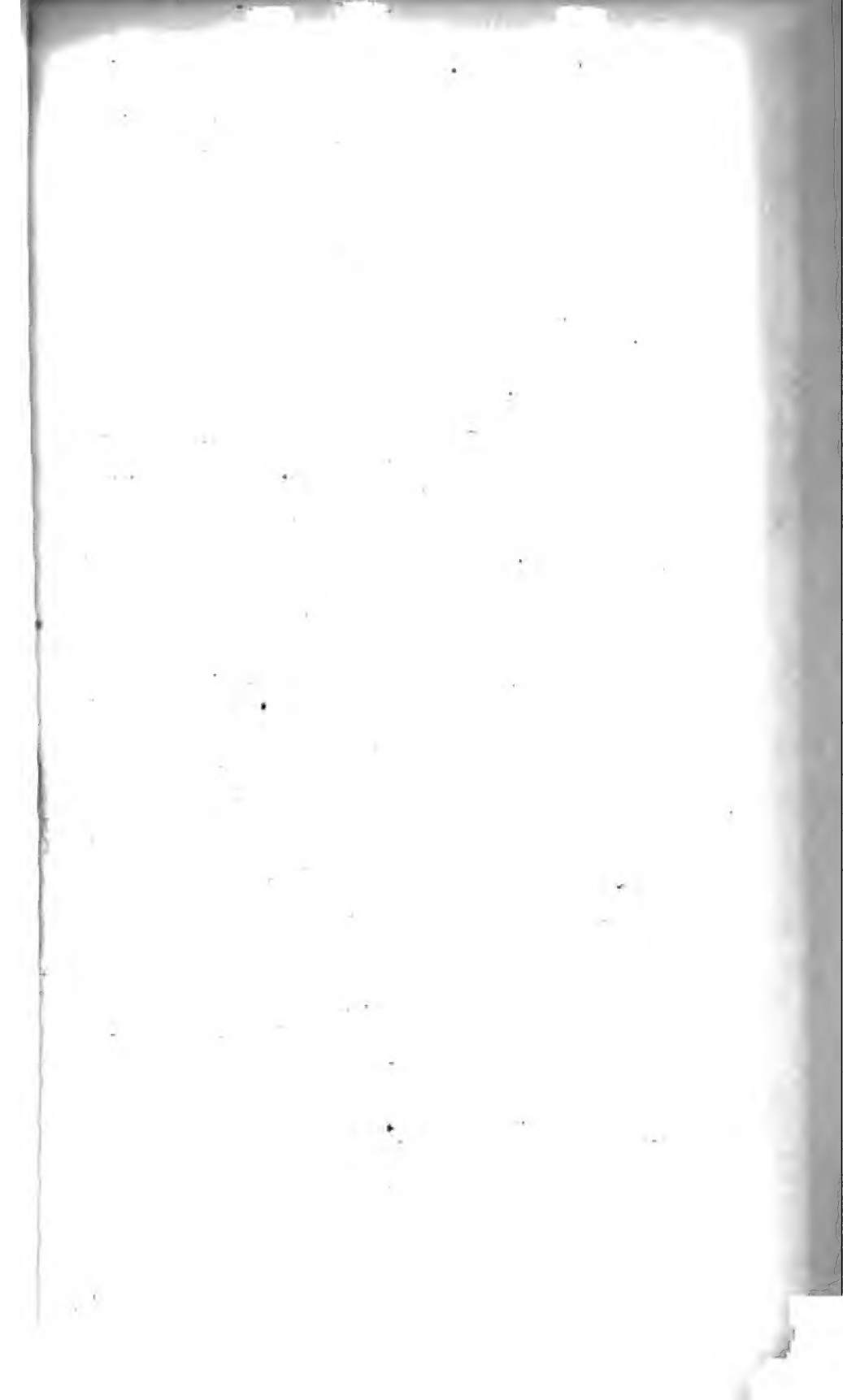
See *Water and Watercourses.*













Standard Law Library



3 6105 063 532 506